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# REPORT OF CASES

DECIDED IN THE

## Court of Queen's Bench.

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BY

CHRISTOPHER ROBINSON, Esq.,

BARRISTER AT LAW AND REPORTER TO THE COURT.

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VOL. XV.

CONTAINING THE CASES DETERMINED  
FROM HILARY TERM, 20 VICTORIA, TO MICHAELMAS TERM, 20 VICTORIA.  
WITH A TABLE OF THE NAMES OF CASES ARGUED,  
AND DIGEST OF THE PRINCIPAL MATTERS.

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SECOND EDITION.

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1878.





JUDGES  
OF  
THE COURT OF QUEENS BENCH,

DURING THE PERIOD OF THESE REPORTS:

THE HON. SIR JOHN BEVERLEY ROBINSON, BART., C. J.

“ ARCHIBALD McLEAN, J.

“ ROBERT EASTON BURNS, J

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*Attorney-General.*

HON. JOHN A. MACDONALD.

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*Solicitor-General.*

HON. HENRY SMITH.





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REPORT OF CASES  
IN THE  
COURT OF QUEEN'S BENCH

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HILARY TERM, 20 VICTORIA (*continued*).

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*Present :*

THE HON. SIR JOHN BEVERLEY ROBINSON, BART., C. J.

“ ARCHIBALD MCLEAN, J.

“ ROBERT EASTON BURNS, J.

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ALLAN V. LEVESCONTE.

A deed executed by the husband alone, purporting to pass the fee in his wife's land, will convey his own interest in it.

EJECTMENT for the west half of lot number 18 in the 3rd concession of Rawdon, in the county of Hastings.

On the trial a verdict was rendered for the plaintiff subject to the following

CASE.

In 1852, Samuel Sands Wood was lawfully married to Eliza Anne Wood, and had been for some time before, and she was then seized in fee simple of the lands in question.

While so seized, in 1852, Samuel Sands Wood made a mortgage in fee of the premises to one Benjamin Dougall, who assigned the same to defendant, who brought an action of ejectment and took possession.

In July, 1856, Eliza Anne Wood and her husband Samuel Sands Wood, conveyed in fee simple, by the ordinary deed of bargain and sale, to the plaintiff, which deed was in due form acknowledged before two magistrates, and the other acts necessary to a conveyance by a married woman complied with, and a certificate endorsed, &c. The mortgage was for £163, and was registered in March, 1852; the deed in July, 1856.

The question is, is the plaintiff entitled to recover on the above facts. The parties are all still alive.

*Bell* for the plaintiff.

*Wallbridge*, Q. C., contra.

ROBINSON, C. J.—The cases of *Doe dem. Wilson v. Wessells* (5 O. S. 282) *Doe dem. Dibble v. Ten Eyck* (7 U. C. R. 600) ; will shew what conclusions this court has come to in respect to the operation of conveyances made by the husband and wife of the real estate of the wife, or rather conveyances intended and attempted to be made, but which were not perfected in the manner required by the statute law of this Province relating to such conveyances. I am not aware of any case in which the Court of Common Pleas in Upper Canada has had to deal with the question.

So far as this court is concerned, I think our judgment in *Doe dem. Dibble v. Ten Eyck*, (7 U. C. R. 600)-must be taken to have determined the question, and the effect of that decision is to determine that in the case of a deed executed by a married woman jointly with her husband, after the statute 1 Wm. IV., ch. 2, was passed, as well as before, such a deed can convey no interest, either of the husband or of the wife, unless the wife has been examined as to her voluntary consent, and a proper certificate endorsed on the deed.

It was not necessary in that case, neither is it in this, to decide whether the husband could in the face of his own deed maintain an ejectment during the coverture, for the question is not raised in an action to which the husband is a party.

But the point presented here is not the same as in *Doe dem. Dibble v. Ten Eyck*, or in any of the other cases there referred to, for here there is no question about the operation of a deed to which a married woman was a party, either with or without her husband ; but the question is, whether her husband by his deed executed by himself alone, and to which his wife was neither an executing party nor named as a party in the deed, could make a mortgage of the wife's estate which would bind his own interest at least during the coverture.

By law a husband takes a freehold interest during the joint lives of himself and his wife, in land belonging to her in fee or for life, and such interest will pass by a conveyance executed by the husband alone. In *Robertson v. Morris* (11 Q. B. 916) the law was so held, and that in a case where the husband was not tenant by the courtesy, there



being no issue of the marriage. It is equally clear, I believe, that with some few exceptions, none of which apply in this case, every description of property, and every kind of interest in it which is capable of absolute sale, may be the subject of mortgage (Coote on Mortgages § 01, Spence's Eq. Jur. II. 614).

It can only therefore be necessary to consider whether, in consequence of what our legislature in Upper Canada has enacted, the deed of the husband in this case can not have the effect of passing the interest intended.

We must take it now, I think, till the decisions of this court upon the point shall be overruled by a higher authority, that if Sands and his wife had joined in executing the mortgage of the wife's land in 1852, such a deed would have had no effect, even to bar the husband (for the reasons given in Doe dem. Dibble v. Ten Eyck) unless the wife had been examined and a proper certificate given as to her voluntary consent.

But that has been held upon the ground that the statutes deny to such deeds any operation whatever, *even to bar the husband*, unless the wife has been examined and a certificate endorsed on the deed.

Can we properly extend the operation of such an enactment to a deed executed by the husband alone, in relation to which the wife is not required to be and could not be examined? I think not. The provision is not that the land belonging to the wife shall not be affected, either as regards her husband's interest in it or her own, by any deed in which the wife is not joined as a party, and upon which she has not been examined; but that "*the deed of a married woman, executed by her jointly with her husband*," shall not be valid, or have any effect, &c. It may seem repugnant that a deed executed by a husband jointly with his wife, but on which there is no certificate of the wife's examination, should be inoperative even for the purpose of barring the husband during coverture, and yet that a deed executed by the husband alone shall bar the husband; and I confess this has appeared to me to create a difficulty; but my opinion, after fully considering it, is that although the married woman must be held entitled to the full measure of protection which the language of the statute gives her, we can not extend the words of such

positive enactments to deeds to which they do not by any allowable construction apply, and so create a disability in the husband unknown to the common law and at variance with its principles.

The statutes in question are enabling statutes. The legislature by them was permitting a married woman to execute a deed which by the common law she would have had no power to execute, and they could qualify their authority by imposing whatever restrictions they pleased upon the operation of such a deed as they were enabling her to join in. But as to the right of the husband to dispose by his sole deed of his interest during coverture in his wife's land, that was a subject on which they were not legislating; and as their statutes do not in terms apply to such instruments, we can not properly make them apply by assuming a latitude of construction in order to produce an effect which we can not reasonably suppose the legislature contemplated. The defendant, we think, is entitled to hold possession of the estate under the mortgage assigned to him, the husband and wife being both still living.

The circumstance of the husband having assumed to mortgage the fee-simple of the estate when he had not that interest in it, does not, I think, prevent its being binding upon his estate to the extent of the freehold interest which he actually held.

In my opinion the *postea* should go to the defendant.

McLEAN, J.—By the admission of the parties it appears that Samuel Sands Wood, at the time he made the mortgage to Benjamin Dougall, was in possession of the land in question, the estate of his wife, being entitled to hold it for his own use at all events during her lifetime, and having a life estate in it as tenant by the courtesy, if he had issue by her. Being so entitled he could have made a lease of the premises to hold to the lessee during his own lifetime or that of his wife, upon any terms which he might think expedient, and he could legally pledge it or mortgage it to the extent of his own interest to any one to whom he was indebted, or his interest could be sold on execution. His mortgage to

Dougall, the treating the land as if it were his own, must have the effect of pledging all his interest, whatever that was. Possession has been legally recovered, and is now held under it, and can it be defeated by any thing which Wood could do, or which he and his wife might join in doing? The statute for the protection of married women in conveying their real estate does not apply in such a case as this, for the husband alone, even against the consent of his wife, could convey his individual interest, and he has done so, with or without her consent. If the mortgage had been from Wood and his wife to Dougall it would be assumed to convey some interest of the wife, and in such case under the statute could not be held of any *force* or *effect* whatever, unless acknowledged before a judge or two justices of the peace. This anomaly would then arise, that the deed of the husband and wife affecting the wife's land must be held invalid unless duly acknowledged, but the deed of the husband alone must be held good as touching his interest. As the wife could not convey her land without the consent of her husband and his becoming a party to the deed, so by becoming a party he cannot defeat his own deed previously given. The deed to the plaintiff from Wood and wife will undoubtedly convey the fee, but the plaintiff can not under it be entitled to possession till after the interest ceases which Wood, the husband, would still have, had he not transferred it, unless indeed by the payment of the mortgage money.

As in equity the rent of land held by a mortgagee must be applied towards the extinguishment of the debt secured, the plaintiff will be entitled to claim his property whenever the amount of the mortgage to Dougall is discharged, either by the use of the land or payment otherwise; but he has purchased subject to a valid incumbrance, and can only obtain possession by its removal in some way. Judgment must therefore be in favour of the defendant on the point submitted for the consideration of the court.

BURNS, J., concurred.

Judgment for defendant.



IN RE BANNERMAN AND THE MUNICIPALITY OF THE  
TOWNSHIP OF YARMOUTH.

*Statute labour—By-law to compel performance of.*

The municipality of a township by by-law enacted that any person liable to perform statute labour, who after being duly notified should neglect or refuse to attend, should forfeit and pay 5s. for every day he should so neglect or refuse, and the payment of such fine should release such person from the performance of the duty required of him by such by-law.

*Held*, that this enactment could not be considered as an attempt to compel commutation at a rate exceeding 2s. 6d. per day ; and that the by-law was good.

*Jackson* obtained a rule on the municipality of Yarmouth to shew cause why their by-law entitled, "By-law No. 91, to define the duties of path-master, and of parties liable to perform statute labour in the municipality of Yarmouth," should not be quashed, wholly or in part, with costs.

1st. Because the same is illegal, being an attempt to enforce payment of a greater sum than 2s. 6d. as a commutation for each day's statute labour.

2nd. And because the municipality has exceeded its powers by imposing a fine of five shillings for each day's statute labour not performed.

3rd. And because it is attempted by the by-law to compel parties liable to the performance of statute labor to compensate therefor at a rate exceeding 2s. 6d. for each day's labour, contrary to the statute.

In this by-law, which was passed on the 12th of March, 1855, besides various regulations respecting the duty of path-master, and other matters relating to the highways, it was enacted, "that any person within the municipality liable to perform statute labour, who, after being duly notified by the path-master, shall neglect or refuse to attend himself at the time and place appointed, or send an able-bodied man in his stead, with such waggon, team, or implement as he may be owner of, and be directed by the path-master to bring, shall forfeit and pay the sum of 5s. for every day he shall so neglect or refuse ; and the payment of such fine to the reeve or deputy-reeve shall release such person from the performance of the duty required of him by the provisions of this by-law ; and any person discharged for not working faithfully, or for not carrying sufficient loads with his team, shall not be

allowed for the part of the day that he may have laboured, and shall be liable to the forfeiture which every such person would have incurred had he not attended either in person or with his team." And by the last clause it was enacted, that all the penalties, fines and forfeitures imposed under the authority of this by-law, if not otherwise paid, should be recovered by a summary sale and distress of the goods and chattels of the person making default, by a warrant under the hand and seal of a magistrate; and in default of goods to satisfy the fine and charges, the offender should be forthwith committed to the common gaol of the county of Elgin for a period not exceeding twenty days.

Bannerman, who made this application, swore that on the 10th of July, 1856, he was served with a summons to attend on the 12th of July, at, &c., before such justices of the peace of the county of Elgin as should be then present, to answer for his neglect to do statute labour for 1856, after being duly warned, contrary to the by-law now in question: that he did attend on that day before the reeve of the municipality, "and though he proved that he had tendered 2s. 6d. for each day's statute labour that he was liable to perform, in lieu of and as a commutation for such statute labour, the reeve fined him five shillings for each day's statute labour."

*D. B. Read* shewed cause.

*Richards* supported the rule, citing *Barclay v. The Municipality of Darlington*, 12 U. C. R. 86; *Tilt v. The Municipality of Toronto*, 13 U. C. R. 447.

ROBINSON, C. J.—I do not think that the by-law complained of can be held void in consequence of any thing decided by the court in the case referred to, of *Tilt v. The Municipality of the Township of Toronto*. The by-law in that case fixed 5s. as the amount per day at which parties might commute for their statute labour; but we held that the municipality had no authority to name a sum beyond 2s. 6d. as the rate of commutation.

The by-law now complained of can not operate upon either residents or non-residents, so as to compel them to commute at any sum, nor does it empower them to commute.

It is a by-law passed under the enactment in 12 Vic., ch.

81, sec. 31, which gives to the municipality power to pass by-laws for enforcing the performance of the statute labour. Under it no one can claim a right to commute; for all that we see in the by-law all persons resident may be called upon to do the labour, or send some one to do it.

It is not contemplated by the statute 16 Vic., ch. 182, that when there is no provision for commuting, or when there is such a provision, but the party has not commuted, he can refuse to attend when warned, and claim to be exempt from any penalty by paying 2s. 6d. a day, or any other sum.

The municipality have a right to enforce the doing the labour by imposing a penalty for non-performance, keeping themselves within the limits mentioned in the 31st section of 12 Vic., ch. 81, sub-sec. 29, which they have done here, as to amount of fine and term of imprisonment.

MCLEAN, J.—The part of the by-law which is complained of provides “that any person within the municipality liable to perform statute labour, who after being duly notified by the path-master shall neglect or refuse to attend *himself* at the time and place appointed, or send an able-bodied man in his stead, with such waggon, team or implements as he may be owner of, and be directed by the path-master to bring, shall forfeit and pay the sum of five shillings for every day he shall so neglect or refuse, and the payment of such fine to the reeve or deputy-reeve shall *release* such person from the performance of the duty required of him by the provisions of this by-law.”

It is contended that this enactment is equivalent to a provision that five shillings shall be paid for *commuting* each day's statute labour, if not performed at the time and in manner prescribed by the path-master, and the effect and operation of it may be so; but there can be no doubt that the municipal councils had and have authority by law to enact that any person disregarding the path-master's notice to perform statute labour shall be subject to a fine ever of larger amount than is imposed by the by-law in question, and that the amount of a fine so imposed may be collected by distress and sale of the goods of a delinquent. If in this case the



municipal council had contented themselves with imposing a fine of 5s. for each day's neglect or refusal to perform statute labour after being duly notified—leaving the statute labour to be performed, or commuted for at the sum of 2s. 6d. a day, as authorised by the statute,—I apprehend that the by-law could not be held illegal or liable to be quashed ; but instead of imposing a fine, and requiring the statute labour also to be performed, the by-law imposes such an amount of fine as in the judgment of those who enacted it shall be a sufficient punishment for neglect, and at the same time cover the amount of commutation prescribed by law and they relieve the party on payment of the amount of fine from the performance of statute labour. If they have a right to impose and to collect a fine of 5s. for each day's neglect after being duly warned as it appears to me they undoubtedly have, it cannot surely afford ground of complaint to a party fined that he is not also compelled to perform, or that he is relieved from the performance of, his statute labour. It is only in cases of neglect that the provisions of the by-law can apply in the manner complained of. It does not in any way interfere with the right of commutation before neglect, and it only provides that in cases of neglect a sum equal to the regulated commutation and a fine of 2s. 6d. for each day shall be paid. It cannot be regarded as an oppressive provision, and it certainly appears to me to be a wise and convenient one, to compel parties guilty of neglect by one proceeding to make good the value of their statute labour and to pay a fine for such neglect. No one is compelled to expose himself to such an alternative, and it can always be avoided by the performance of statute labour, or by commuting for it at the time such labour is required.

It certainly cannot afford sufficient ground for setting aside a by-law, that the municipality by which it has been enacted have been more lenient than it was incumbent on them to be in relieving parties from performance of statute labour, on payment of a certain amount of fine to which such parties have exposed themselves by their own neglect. I can not see that a party who has been subjected to a fine by reason of his own neglect has a right to complain, because having

paid that fine he is not also called upon to perform his statute labour, or to commute for it at 2s. 6d. a day. It is true that a party who neglects the path-master's warning can not, after complaint of such neglect, be discharged or relieved from its consequences by the payment of the commutation of 2s. 6d. a day ; but if after such neglect a party, before being fined, were to offer such commutation to the path-master, I incline to think that he would at once receive it, but its receipt would not relieve the delinquent from the payment of the fine of 5s. a day if proceedings were taken against him under the by-law for his neglect.

The 5s. fine is not an amount to be paid in lieu of commutation, but is a penalty for neglect, which the municipal council had a right to impose ; and though they have chosen to say that on payment of such fine no statute labour shall be required from those who have paid it, that cannot render the by-law illegal which makes neglect subject to a fine.

On these grounds I think the rule must be discharged, with costs.

BURNS, J.—I do not think this by-law is open to the objections taken to it. It is not like the by-law of the township of Toronto, in the case of *Tilt* (13 U. C. R. 447), which was for the commutation of the statute labour at 5s. per day. The argument in the present case is that this by-law is a pretext for obtaining more than the amount the council is by law authorised to fix the commutation at ; and that imposing a penalty of 5s. a day, and stating that the payment of the penalty should release the person from the performance of the duty required of him, is in truth but a mere evasion of the law. This by-law is not for fixing any commutation upon the resident rate-payers, but one for regulating the mode, &c., of the statute labour, and for imposing penalties for non-performance of it. If the rate-payers do the statute labour imposed by statute law, or according to the number of days fixed by any by-law of the council, then no penalty is incurred. There can be no question that the council may impose a penalty for the non-performance of statute labour ; and the only questions, as it

appears to me, upon this by-law are, first, whether the penalty is properly imposed for each day's labour as expressed in this by-law, or whether there should not have been a penalty imposed for neglecting to appear and do the work, when notified by the path-master ; and, secondly, whether stating that the payment of the penalty shall release the person from performance of the statute labour, is not exceeding the powers of the council.

With respect to the first of these positions, we must look how the law stood before passing the statute 12 Vic., ch. 81, and then at the statute, and see what alterations were made and what new powers conferred. Under statute 1 Vic., ch. 21, sec. 27, a penalty of 5s. a day for each day the person should neglect or refuse to attend when duly notified, should be forfeited and paid by such persons, to be recovered on complaint of the overseer. The 190th section of 12 Vic., ch. 81, enacts that all rules and regulations made by the municipal corporation shall have the like force and effect as those which the magistrates had previously the power of making respecting the same ; and neglect or disobedience to any such rules or regulations so to be made by the municipal corporation, shall subject the defaulter to the like penalties, forfeitures and consequences, both civil and criminal, as such neglect of, or disobedience to, similar rules, regulations or directions of such magistrates, would have subjected him to previously. It is true that under all the previous acts the magistrates had not the power of fixing the penalty—that seems always to have been done in the respective statutes ; —but besides the act referred to to shew that the penalty fixed was one for each day, I refer to 50 Geo. III., ch. 1, secs. 11 & 17. The penalty in section 17 is fixed for neglect of those who may be directed to do so with a team at 10s. for every default, and upon those not directed to work with a team at 5s. for every default. Section 11 declares that every person neglecting to obey the order of the overseer under the authority of that section, shall be subject to the like penalty as if he had been a wilful defaulter *for that day*, to be recovered as thereafter set forth. It is abundantly evident therefore that the legisla-



ture contemplated that each day's default should constitute a penalty, and that was made quite plain by 1 Vic., ch. 21. I do not think the municipal council can be said to have done wrong, or exceeded their powers, when they have done no more than pass a by-law to the effect and in accordance with the law of Upper Canada as it stood at the time these bodies were brought into existence.

As to the next point, the complainant does not object that the by-law is illegal because the payment of the penalty is declared to discharge him from the performance of the duty and indeed we should scarcely find him complaining of that matter, for in that respect the alteration made by the by-law from the former statute law is in ease of him. The statute before referred to, 1 Vic., ch. 21, sec. 27, declares that the imposing of the fine or penalty shall not release the person from performing the duty required of him, but he shall be liable to perform the same at any time within the current year, as though no such penalty had been imposed. This by-law mitigates the former law, and certainly is within the extent of what the legislature had before enacted. The only argument that can be used respecting the payment of the fine operating as a discharge of the duty imposed is that one which has been used in this case, namely, that it presents the appearance of being a case where the council is endeavouring to effect a commutation of the statute labour. The answer to that however is very plain: the complainant had not the option whether to pay a commutation or do the work; the power to enable persons to compound was vested in the council, and a by-law should be first passed upon the subject. In the present case the council has passed no by-law authorising composition, but has left it optional with the parties whether to pay a fine or do the work, and the complainant is at liberty to exercise his choice. Whether under the 16 Vic., ch. 182, sec. 36, there may be any difference made as to the amount of commutation between those persons who do not stand on the assessment as *landholders* (in respect of whom, under the 12 Vic., ch. 81, sec. 31, subsec. 27, the commutation was not to exceed 2s. 6d. for each day) and those who do not appear as landholders, need not

be examined in this case. As before stated, the municipal council has not commuted the statute labour, but simply has enforced the doing of it under a penalty, which is to release the person from the duty if he chooses to pay the penalty. I do not see any thing illegal in that.

The complaint against this by-law is not well founded, and the rule for quashing it should, I think, be discharged.

Rule discharged.

### TAYLOR ET AL. V. JARVIS.

#### *Fi. Fa.—Chattel Mortgage—Priority.*

On the 9th of January M. & Co. mortgaged certain goods to R., which on the 19th the sheriff seized under a writ of *fi. fa.* On the 22nd of February, while the sheriff was in possession, M. & Co., made a bill of sale to the plaintiff. The mortgage to R. was satisfied after the seizure, and before the sale by the sheriff (which took place by consent of all parties), but whether before or after the execution of the bill of the sale to plaintiffs did not appear.

*Held*, that the *fi. fa.* was entitled to prevail over the plaintiff's claim.

TROVER for printing presses and material.—Verdict for the plaintiffs, subject to the opinion of the court upon the following

#### CASE.

McIntosh & Hand were in January, 1856, possessed of certain printing materials.

On the 9th of January, 1856, McIntosh & Hand by bill of sale mortgaged these goods to Hugh Rogers for £50, payable on or before the 9th of January, 1857, which was duly registered with the county court clerk the same day.

On the 19th of January, 1856, a *fi. fa.* goods was placed in the sheriff's hands in the suit of Anderson v. McIntosh & Hand, under which the sheriff entered and took possession. On the 22nd of February, 1856, while the sheriff was in possession, but while McIntosh & Hand were allowed to use the printing materials and office, McIntosh & Hand made a bill of sale to the plaintiffs for £211 13s. 3d., payable, £75 on the 18th of April, 1856, £75 on the 18th of June, and the balance on the 25th of August, 1856.

The sheriff sold the goods under the writ of *fi. fa.*, all parties consenting to the sale, he having notice of the plaintiffs' claim under the mortgage.

The mortgage of Rogers was paid and satisfied by some person or persons to the sheriff unknown, but was not satis-

fied out the proceeds of the sale of the goods, but after the seizure by the sheriff.

The question for the opinion of the court is, whether at the time of the seizure the sheriff could seize the goods legally under the circumstances, and whether satisfaction of Rogers' mortgage before sale could make any difference, and whether under the facts and circumstances the *fi. fa.* in the hands of the sheriff attached upon the goods prior to the execution of the mortgage to the plaintiffs.

*Hallinan* for the plaintiffs.

*Eccles*, Q. C., for defendant.

ROBINSON, C. J.—I assume that we are to look upon the mortgage to Rogers as given *bona fide* and on good consideration, so that if it had remained unsatisfied he would have been entitled to hold against the sheriff; and on the case stated we must also, I suppose, assume that the mortgage to the plaintiff was duly executed by McIntosh and Hand.

The parties should have told us, if they could, whether Rogers' mortgage was or was not satisfied before the other mortgage was made to the plaintiff.

If not satisfied till afterwards, which may have been the fact, it would make the case stronger in favour of the defendant, because in that case there was an interval, no matter how short, when the sheriff having the goods in his possession held a writ of execution which authorized him to seize them on account of Anderson's debt, and he needed not to go through the formality of making a seizure of goods which he already held.

It is admitted in the case that all parties, including Taylor and Putnam, were consenting to the sheriff's sale, intending I suppose at the time to litigate about the right to the proceeds of the sale. If the mortgage to Taylor & Putnam was made after that to Rogers had been satisfied, and while the *fi. fa.* was current, then I think the case is clear against the plaintiff, and we could not hold it to be otherwise till we knew how that fact was.

But if the case had stated that the mortgage to Taylor &

Putnam was made before Rogers' mortgage had been paid off, how would the case then stand ?

As all parties agreed that the sheriff should sell as he did sell, the plaintiffs so consenting cannot treat him as a wrong-doer in so selling ; and certainly he was not a wrong-doer as concerns Taylor & Putnam in seizing when he did, for they had then no interest.

The dispute therefore must be looked upon as a contest about the right to the proceeds of the sale. Looking at the pleadings upon the record and the facts admitted, we cannot hold the defendant guilty of a wrongful conversion in selling, for it is admitted he had the leave of the plaintiffs to sell the goods, as he pleads he had.

Then as to the right to the money (if we can properly go into that in this form of action) when we see that the defendant was not guilty of any wrongful conversion as against the plaintiffs, our opinion is that the right of the execution creditor is under the circumstances entitled to prevail, for McIntosh & Hand were the owners of the goods subject to the lien they had given to Rogers, while that lien continued. These plaintiffs, Taylor and Putnam, cannot set up Rogers' right for the purpose of making the sheriff a wrong-doer as regards them. When Rogers' mortgage was satisfied it was thenceforth to be taken, we think, as if it had never existed, so far at least as regards all other persons, and in that case there was nothing to stand in the way of the completion of the execution, for the plaintiffs had no interest in the goods when the sheriff seized them, nor till more than thirty days afterwards.

If McIntosh & Hand had made no second mortgage, they could not have contended against the sheriff's right to sell after Rogers' mortgage had been satisfied ; and that being so, they could not, by the assignment to these plaintiffs while Anderson's writ was in the sheriff's hands, place them in a better position than they would themselves have stood in if they had made no such assignment.

The defendant is entitled, in my opinion, to the postea.

MCLEAN, J.—The defendant as sheriff was in possession.



of the goods upwards of a month before the plaintiffs' bill of sale was executed, and it does not appear at what time the amount of the bill of sale to Rogers was discharged. If before the date of the bill of sale to the plaintiffs, the execution would of course attach upon the goods, so that McIntosh & Hand could not dispose of them; but if after the plaintiffs' bill of sale was given, and while the sheriff had possession under the *fi. fa.*, the latter would surely be entitled to precedence. The bill of sale to Rogers gave him a lien on the goods for a small portion of their value, but McIntosh and Hand were not divested of their property in them, and had a right to retain and use them as their own; and whether the claim of Rogers would become absolute or not would depend upon the payment of the £50 due him within the time agreed on. That McIntosh & Hand were the owners of the goods notwithstanding the lien of Rogers seems to be admitted by the plaintiffs taking a second mortgage. If the mortgage transferred the property to Rogers, then, while it remained *his*, McIntosh & Hand could not transfer it to the plaintiffs; if it was not transferred absolutely to Rogers, then the execution would bind it, and the seizure must be good. It can not rest with the plaintiffs to say that McIntosh and Hand had sufficient property in the goods to enable them to give a bill of sale, but not such a property as made the goods liable to seizure. If they had any property in them it was liable to seizure, and at the time of the seizure no one but Rogers could have any right to complain.

A bill of sale taken while goods are in the sheriff's hands under a *fi. fa.* cannot defeat the operation of the writ, because the goods may have been subject to a lien given before seizure to secure a small debt due to another party.

I think the plaintiffs are not entitled to recover as the owners of the goods which the sheriff held under execution before they had any interest in them, and that a verdict for the defendant or a nonsuit should be entered.

Judgment for defendant.

## GEORGE MOBERLY V. THOMAS BAINES AND THOMAS SHORTIS.

*Promise to pay in consideration of forbearance to or discharge of third party  
—Proof of forbearance or discharge—Forbearance to exercise a doubtful  
right—How far a good consideration.*

C. had contracted with defendants to carry their lumber from Collingwood, to Chicago, and had chartered the plaintiff's vessel for that purpose. C. being indebted to the plaintiff, gave him two orders on defendants amounting to £211 10s. 6d. Defendants did not accept the orders formally when presented, but retained them and gave the plaintiff written authority to draw on them at ten days on the return of the vessel to Collingwood. The plaintiff drew accordingly, but defendants then told him that C. had been over-paid by them, and they refused to accept. It was shewn that the plaintiff had threatened to detain the lumber on its arrival at Chicago if his claim was not paid, and was told by defendants that it would be satisfied out of the moneys coming to C. on the return of the vessel.

*Held*, that the plaintiff was entitled to recover from defendants, for that the evidence sufficiently shewed a discharge of C. by the plaintiff, or a giving time to him until ten days after the return of the schooner, either of which would form a good consideration for defendants' promise. *Quære*, whether plaintiff's forbearing to detain defendants' lumber as he had threatened would have been a sufficient consideration, it being unknown to the parties whether the law at Chicago would allow him such right, though our law clearly would not.

*ASSUMPSIT.—First count* ; That one G. M. Chapman was indebted to the plaintiff in the sum of £211 10s. 6d., and that defendants were indebted to Chapman in a like sum ; and defendants, in consideration that plaintiff would discharge Chapman from the debt so due to the plaintiff, promised the plaintiff to pay him the same : that the plaintiff did discharge Chapman from the said debt, and the same was wholly extinguished ; yet defendants have not paid the said sum of £211 10s. 6d., or any part thereof, to the plaintiff.

*Second count* : That one G. M. Chapman was indebted to the plaintiff in £211 10s. 6d., and defendants were indebted to Chapman in a like sum : that defendants, in consideration that the plaintiff would discharge Chapman from the said debt, promised the plaintiff to pay him the same by accepting a bill of exchange therefor, to be drawn by the plaintiff on defendants at ten days after sight, upon the return to the port of Collingwood of the schooner or vessel called the "Caroline Marsh:" that the plaintiff, in consideration of the said promise, afterwards, and before the commencement of the suit, discharged G. M. Chapman from all liability for the said debt, and that the same became and was extinguished, of which defendants had notice : that afterwards, and before

the drawing of the said bill, the said schooner or vessel "Caroline Marsh" returned to the port of Collingwood, and thereupon, after such return, the plaintiff did draw a certain bill of exchange upon the defendants for the amount of the said debt of £211 10s. 6d., payable ten days after sight, and the plaintiff then requested the defendants to pay to him the said debt by accepting the said bill of exchange so drawn, yet defendants, not regarding their said promise, did not nor would pay to the plaintiff the said sum, or any part thereof, by accepting the said bill of exchange or otherwise, but wholly neglected and refused, and still neglect and refuse so to do, whereby the plaintiff has been deprived of the use and benefit of the said bill of exchange, which defendants ought to have accepted as aforesaid.

*Third count:* That in consideration that the plaintiff would give time to and forbear to sue G. M. Chapman for the debt due to him of £211 10s. 6d., in the second count mentioned, the defendants then promised the plaintiff to pay him the same so soon as a certain vessel called the "Caroline Marsh" returned to the port of Collingwood: that though the plaintiff did thereupon give time to and forbear to sue G. M. Chapman in pursuance of the said agreement, and although the said schooner or vessel returned to the said port, and although a reasonable time hath elapsed, the defendants have not paid to the plaintiff the said sum of £211 10s. 6d., or any part thereof, to the plaintiff's damage of £300.

*Plea.*—That defendants did not promise as alleged.

This case was tried before *McLean*, J., at Barrie, at the last assizes. It appeared in evidence that the defendants were partners in lumber transactions at their mill in Innisfil, and were in the habit of shipping lumber from Collingwood to Chicago: that they had made a contract with one G. M. Chapman to carry their lumber at the rate of \$4 per thousand feet to Chicago, to be paid on the return of the vessel to Collingwood: that Chapman, to carry out his contract with the defendants, employed or chartered a vessel of the plaintiff called the "Europe," and another vessel called the "Caroline Marsh:" that two cargoes having been carried

to Chicago by the plaintiff's vessel, Chapman gave the plaintiff two orders on the defendants, one desiring them to give plaintiff their note for £85 at three days' date, and the other directing the defendants to pay to the plaintiff \$4 per thousand on the cargo of the "Europe" to Chicago, amounting to £126 10s. 6d. These orders were dated on the 30th of June, 1856, and on the 2nd of July they were presented to the defendants, who then said that Chapman had overdrawn the amount due to him, but that on the return of the "Caroline Marsh" from Chicago the defendants would do what they could to protect him. The witness called to prove the defendants' undertaking was asked whether the plaintiff had not threatened to detain the cargo of lumber then on board the "Europe" at Chicago, unless the defendants settled with him for the amount of Chapman's orders, but said that he might have so threatened to Mr. Shortis, but he did not hear him. The defendants did not then accept the orders of Chapman formally, but they retained them and gave the plaintiff a paper authorising him to draw upon them at ten days for the amount of the orders, on the return to Collingwood of the schooner "Caroline Marsh." The plaintiff in pursuance of that authority drew on the defendants for £211 10s. 6d. after the return of that vessel to Collingwood, but was then told that Chapman had been overpaid, and the draft was refused acceptance. It was shewn by defendants' clerk that they had paid £100 in advance on the last cargo of the "Caroline Marsh" to enable the vessel to get out from Collingwood, and that they had been obliged to pay a draft of about £144 to prevent the lumber on board of that vessel from being detained at Chicago. The defendants were aware of the state of Chapman's account on the 2nd of July, 1856, when the authority to draw upon them was given to the plaintiff, and Chapman's orders had always remained in their possession. Chapman gave up his contract, and took no more lumber of defendants after the load which was on board of the "Caroline Marsh" at the time the orders to the plaintiff were given.

A brother of the plaintiff who was with him at the defendants testified that he heard Mr. Shortis tell the plaintiff to



go to Chapman and get his orders, and that they would be accepted and paid out of the moneys to be paid to Chapman for freight on the "Caroline Marsh:" that the plaintiff then told Mr. Shortis that if his claim was not paid he would detain the lumber which was then on board of the "Europe," either on the way to or at Chicago, and that the plaintiff would have telegraphed to Chicago to detain or sell the lumber if Mr. Shortis had not undertaken to pay. That lumber was delivered at Chicago by the captain of the vessel, who was told by the plaintiff that he would receive a telegraph at Chicago if no arrangement was made respecting the freight.

The presentment of the plaintiff's draft to the defendants, and its subsequent protest for non-acceptance, were proved by a bank agent at Collingwood.

The plaintiff having closed his case, *Patterson* moved for a nonsuit, on the ground that the evidence did not sustain any count of the declaration.

The learned judge declined to nonsuit, considering that there was evidence for the jury on the second count; and told the jury that he thought there was evidence to shew that the plaintiff did discharge Chapman from the amount due by him:—that having received orders from him, and surrendered these orders to the defendants, they would be entitled to charge Chapman with the amount, and that Chapman, if he desired to do so, could not afterwards compel the defendants to pay him that sum: that having thus discharged the defendants from the payment of so much to him, Chapman had a right to consider the amount as paid by him to the plaintiff, and that the plaintiff could not claim his debt from Chapman without giving up to him his orders on the defendants, which he could not do: that the defendants undertook to accept the plaintiff's draft for the amount of Chapman's orders, whether they had any moneys of Chapman in their hands or not; and that the plaintiff's right to have his draft at ten days accepted by the defendants did not depend upon any contingency except the arrival of the "Caroline Marsh" at Collingwood.

*Patterson* objected to the charge to the jury, contending

that the delivery of the orders to the defendants did not amount to a discharge of Chapman.

The jury gave a verdict in favour of the plaintiff for £213 12s. 10d. on the second count, and for the defendants on the first and third counts.

*Patterson* obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a new trial had between the parties, on the ground that the verdict was contrary to law and evidence, in this, that it was not shewn that the debt of G. M. Chapman to the plaintiff, mentioned in the declaration, was discharged by any act proved at the trial; and for misdirection, in directing the jury that the retention of the orders of Chapman by the defendants amounted to such discharge, and in not leaving to the jury the consideration of the evidence as explaining such retention. He cited *Hutton v. Bragg*, 7 Taunt. 14; 1 Camp. 425, notes.

*Adam Crooks* shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion the plaintiff was properly allowed to recover.

What passed between the plaintiff and the defendant in this case would have been sufficient before the statute 7 Wm. IV., ch. 52, sec. 2 to constitute an acceptance of the bill; but though that is now out of the question; the defendants may have made themselves liable as upon a promise to accept, and to answer in damages for a breach of that promise; and as the transaction on which this action is founded was one of a strictly mercantile character, there seems to be no good reason for requiring stricter proof of a consideration for the promise to accept than it would have been necessary to give in an action as upon an acceptance between the same parties, if all this had taken place before the statute.

The first question is whether by what passed the defendants rendered themselves legally liable to the plaintiff for the sum which they had assumed to pay him on Chapman's account. We think they did. That they did promise to pay

him that precise sum of £211 10s. 6d. on Chapman's account is clearly made out by the evidence, and also that they promised to pay him that sum within ten days after the return of the "Caroline Marsh" to Collingwood. The agreeing to accept the plaintiff's bill upon them at ten days, to be drawn at any time after the return of the vessel, was in effect to promise the money after the lapse of ten days from the return of the vessel, and there was no absolute necessity, we think, to say any thing about the drawing of the bill: it regarded only the manner of payment, which the plaintiff might or might not avail himself of, as he pleased. The only effect of creating the bill would be to give the plaintiff the use of negotiable paper for the amount ten days before the defendants engaged to pay it,—a convenience which the plaintiff might waive if he pleased.

Then the next question is, was there any such consideration shewn for such a promise as makes it binding in law. In our opinion there was, although we think Mr. Patterson was quite correct in arguing that the plaintiff had no legal right to insist on detaining the lumber on board the "Europe" at Chicago until he was satisfied or secured in the amount of what Chapman owed him.

As we understand the case, there was no bargain between the plaintiff and these defendants about the transportation of the lumber to Chicago, but the plaintiff merely owned the vessel, which he had hired either for the season or for the trip to Chapman; and Chapman having chartered the vessel, which made him for the time the owner, had agreed with the defendants to carry their lumber to Chicago at a certain freight per thousand feet. If these were the facts, there was no debt due from the defendants to the plaintiff, nor from Chapman, on account of the freight of the lumber; and the plaintiff not having for the time the possession or control of the vessel or of the cargo, could not have detained the lumber which he was not really in possession of, till a debt was paid which was due not to him but to other parties.

And it need hardly be said that the plaintiff could not hold the defendants' lumber liable for a debt which Chapman was to pay to him as the charterer of the vessel. That at

least we know to be the law here, and we should assume it to be equally the law at Chicago till we are otherwise informed.

If, therefore, all that could be said in this case was that the plaintiff had threatened to detain the lumber in the vessel at Chicago till he was paid what Chapman owed him, and that in order to induce him forbear that course the defendants had made the promise they are sued upon, there are many cases which would shew that to be not a good consideration. As a general principle a man's promising to forbear doing something which he has really no right to do, does not supply a sufficient consideration for a promise made to him on that account.

There are, however, instances of exceptions being admitted to that principle, in cases where the claim advanced, though not one which the law recognised, might yet appear to admit of question, so that the one party could be supposed to believe that he was giving up an advantage, and the other party might reasonably think it worth his while to make a sacrifice in order to purchase his forbearance.

And if it turned upon such a question in the present case, I am not quite confident that the circumstance of the vessel being at the time in a foreign port, and the uncertainty which the parties might feel as to what the law of the foreign country would allow, might not in this case warrant an exception (a). And when we say that according to the law of England there was no right of lien in the plaintiff, we mean only that the report of the evidence shews no ground for such a claim on the plaintiff's part. It is possible, if the facts were fully explained, that there might have been a foundation for a claim of lien, but none was shewn at the trial.

Independently, however, of any motive of that kind for making the promise, we think it was binding on the defendants. We are not prepared to say that the learned judge was not correct in the view he took at the trial, that the

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(a) See *Longridge v. Dorville*, 5 B. & Al. 117; *Llewellyn v. Llewellyn*, 3 D. & L. 318; *Edwards v. Baugh*, 11 M. & W. 641; *Haigh v. Broods*, 10 A. & E. 309; 1 Atk. 10.



evidence shewed a good cause of action as stated in the second count. It is true that the plaintiff had not by any thing under his hand expressly discharged Chapman; but that is in practice the understood consequence of such a transaction as this was. The plaintiff had agreed to take from Chapman his drafts on the defendants in payment of his debt, or rather he had taken them, and the defendants had so far honoured them, that though they declined to comply with them literally as they were drawn, they pledged themselves in writing to the plaintiff that they would pay him the precise sum for which the orders were drawn, in ten days after the return of the vessel which had conveyed their timber. The plaintiff resting satisfied with that left the orders in their hands, being willing to accept what they proposed as a compliance with Chapman's orders, and to wait patiently till the vessel should return. We are not discussing what might be the legal consequence of the defendant's inability to pay in restoring the plaintiff to his right of action against Chapman, but surely it would have been altogether inconsistent with the position of the parties while the defendants retained Chapman's orders upon them, and while the plaintiff held their written authority to draw, upon them for the amount, if the plaintiff, before the time came for drawing upon the defendants, had molested Chapman, or if Chapman had advanced a claim upon the defendants for the very money which they had promised to pay the plaintiff in compliance with his drafts.

Of course when the plaintiff recovers the £210 11s. 6d., from the defendants he has no longer any claim upon Chapman.

But the plaintiff's claim against these defendants stands, as it appears to us, upon very clear ground, as an undertaking to pay in consideration of the plaintiff forbearing to insist upon payment for Chapman.

If after the plaintiff had accepted the defendants' promise to pay him the £210 in ten days after return of the "Caroline Marsh" he had nevertheless demanded instant payment from Chapman, and had sued him for the same money, he could have been successfully met by the defence that he had

agreed to wait for his money till ten days after the vessel should return, in consideration of these defendants promising at that time to pay him on Chapman's account.

There is no doubt in our opinion, that on one count or the other the plaintiff could sustain his action; and there being no point reserved, we would not grant a new trial when the verdict is in accordance with the justice of the case, and when we see that the plaintiff could by suing in another form enforce his demand for the same amount for which he now holds a verdict.

Rule discharged (a).

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### BAIN V. GOODERHAM ET AL.

Where flour is guaranteed to inspect of a particular grade, such as "No. 1 Superfine," it must inspect sweet of that grade. If it inspects as of the grade contracted for, but sour, the guarantee is broken.

**SPECIAL ASSUMPSIT.**—The declaration charged that on the 16th of August, 1856, in consideration that the plaintiff, at the request of defendants, would buy from them 300 barrels of flour for £600, and that the plaintiff was desirous of buying the same to be shipped from Toronto to Montreal, in Lower Canada, there to be sold by the plaintiff, of which defendants had notice, the defendants promised the plaintiff to deliver to him the said 300 barrels of flour, and that the same were then of a certain brand, description and quality, to wit, of the description and quality known and branded as "Elgin Mills flour," and that the same was then guaranteed to inspect No. 1 superfine in Montreal aforesaid. And the plaintiff then averred that he bought the said 300 barrels, &c., and paid the said price, and that defendant delivered the flour to him. Yet that defendants deceived the plaintiff in this, that the flour did not inspect No. 1 superfine at Montreal aforesaid, and was not at the time of making the said promise, nor afterwards of the said description, &c., but of a totally

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(a) See *Smith v. Brown*, 6 Taunt. 340; *Brampton v. Paulin*, 4 Bing. 264; *Pullin v. Stokes*, 2 H. Bl. 315; *Bailey v. Croft*, 4 Taunt. 611; *Smith v. Algar*, 4 Taunt. 603; *Smart v. Chell*, 7 Dowl. 787; *Morton v. Burn*, 7 A. & E. 19; *Butcher v. Stewart*, 11 M. & W. 857; *Semple v. Pink*, 1 Ex. 74; *Peate v. Dicken*, 1 Cr. M. & R. 422.

different and much inferior quality, description, and brand, and of much less value at the city of Montreal.

*Pleas*—1st. Non-assumpsit, to the first court. 2nd. To the first court, that the flour did inspect No. 1 superfine in Montreal, and was of the quality, brand, and discription contracted for.

At the trial at Toronto, before *Hagarty, J.*, the evidence proved that a broker sold for defendants to the plaintiff 300 barrels of Elgin Mills flour, and gave the following note of the sale to the plaintiff :

. 16th August, 1856.

SIR,—I have this day bought for your account 300 barrels (more or less) Elgin Mills flour, guaranteed to inspect No. 1 superfine in Montreal at 32s. 6d. per barrel.

J. BAIN, Esq.

The flour (302 barrels) was immediatly after sent to Montreal by the plaintiff, and the result of the inspection by the public inspector was as follows, “248 barrels sour fancy superfine; 54 rejected do. do. Said lot has been sour for more than a month.”

The question was whether the warranty was broken.

The plaintiff contended that it was, for that allowing the “fancy superfine” to be tantamount to the “No. 1 superfine” specified in the sale note, yet that 248 barrels of the flour not proving to be sweet upon inspection at Montreal, but being branded by the inspector there as sour, and the other 54 barrels rejected by him, the warranty was broken.

The defendants on their parts maintained that the guarantee did not bind them to deliver sweet flour, or flour that would inspect as sweet at Montreal, but that it only related to the *grade*, viz., “No. 1 superfine,” and not its condition.

The broker who made the sale was examined. He swore that the price 42s. 6d. per barrel was the value of sweet flour at that time; that he should think *sweet* flour to be intended unless sour was mentioned; but that he did not think that the guarantee necessarily meant that the flour should pass inspection as sweet flour in Montreal: that it might be sweet when sold here, and be found sour when inspected at Montreal, especially at that season.

The inspector at Montreal proved that the flour was all sour and musty, and could not have been sound a fortnight before. He swore that in the inspector's office No. 1 superfine means *sweet* flour, unless the word "sour" is added; that they tried every barrel of this flour: that it was sour, and in lumps as hard as a rock.

The person who bought it in Montreal as sour flour gave 31s. 3d. a barrel, and would have given, as he said, 35s. if the flour had been sweet. He swore that he was a baker: that he bought the flour on the 25th or 26th of August, having examined it: that it must have been sour a month: that by the usage of trade in Montreal flour must pass as sweet of the quality designated, or the guarantee is understood to be forfeited; that bakers used it when sour by mixing it with other flour.

A Montreal broker, and two dealers, one in Toronto, another in Montreal, swore that the guarantee for inspection No. 1 superfine was understood in the trade to mean that the flour should pass inspection as sweet flour at the place named.

Another witness for the plaintiff swore that he inspected this lot of flour in Toronto about the 14th of August, and found four barrels sour out of six which he examined. They were, as he said, badly sour. That witness understood that on such a guarantee as was given in this case it must be sweet when it is sold, but that it is not necessary that it should be sweet upon inspection in Montreal.

On the part of the defendants a dealer in Toronto was called, who swore that he did not understand by this guarantee that the flour was necessarily to pass inspection as sweet flour in Montreal, the word "sweet" not being inserted, though it bound the vendor to deliver sweet flour at the place of delivery.

A broker in Toronto, who had been a flour dealer in Montreal, swore that this guarantee in his opinion referred to grade only, not to condition; that where the buyer exacts that the flour shall prove sweet at the place where it is to be inspected for him, he insists on having the word "sweet" inserted. This witness also swore that he was instructed to



sell this same flour in Toronto, and offered it to two persons, who on examination said it was turning sour, and declined taking it.

It was after this that the plaintiff purchased the same lot from another broker. The witness swore that he did not tell the defendants that their flour had been objected to as sour.

It was proved that in summer flour will sometimes turn sour in a very short time.

The learned judge inclined to the opinion that the "No. 1 superfine" had reference to *grade* only, and that the guarantee did not extend to condition, but he reserved that as a question of law for the court. He did not consider that any general recognised custom of trade in that respect was clearly shewn.

This, however, he left to the jury to find, and it was agreed that a verdict should be given for the defendants, with leave reserved to the plaintiff to move to enter a verdict for him, for £56 12s. 6d., the difference between sweet and sour flour as proved by the witness who bought this lot in Montreal, if the court on all the evidence and the finding of the jury, and being at liberty to draw any inference from the evidence, should think the plaintiff entitled to recover.

The jury found the general usage of trade to be that the flour should be sweet when guaranteed to be "No. 1 superfine," but they did not draw any distinction as to its inspecting sweet at any particular market; and a general verdict was entered for defendants.

*Christopher Robinson*, obtained a rule *nisi* to enter a verdict for the plaintiff, for £56 12s. 6d., pursuant to leave reserved. He cited *Yates v. Pym*, 6 Taunt. 446; *S. C. Holt*, N. P. C. 95; *Vallance v. Dewar*, 1 Camp. 508; *Shepherd v. Pybus*, 3 M. & Gr. 878; *Hutchison v. Booker*, 5 M. & W. 545; *Tay Ev.* 927; 19 & 20 Vic., ch. 87, secs. 14, 23, 24.

*Eccles*, Q. C., shewed cause.

ROBINSON, C. J.—In my opinion the plaintiff's rule should be made absolute. The case of *Yates v. Pym* (6 Taunt. 446) is much in point; but what is more decisive is the com-

mon sense of the thing, and the provisions made for the inspection of flour in the statute 19 & 20 Vic., ch. 87, sec. 14, which directs the inspector that on every barrel of flour which may on inspection be found sour, he shall brand the word "sour," in letters as large as those upon the rest of the brand, in addition to the brand or mark designating the quality. I take "No. 1 superfine" to mean the same thing as the "extra superfine" mentioned in the 23rd clause of the statute. It cannot be contended that "*No. 1 superfine*" and "No. 1 superfine sour" mean the same thing, when the statute expressly requires the difference to be marked, so that if the vendee had followed the flour to Montreal, and had desired the inspector to brand it as "No. 1 superfine" without adding the disparaging epithet of "sour," the inspector dare not have complied.

No doubt "sour flour" may answer as well as sweet for some purposes, and the baker who bought this flour after it was inspected stated that he used it for making bread, mixing it with sweet flour. But that does not prove that the one is at all times, and under all circumstances of the market, as readily saleable as the other, and at as high a price. In this particular transaction it is shewn that the addition of "sour" to the brand, threw a loss upon the plaintiff of 3s. 9d. per barrel, which loss the plaintiff has sustained because the flour did not, according to the warranty, pass inspection simply as "*No. 1 superfine*," but had the damaging addition of "sour" branded on the barrels.

When the legislature has required for the protection of persons in the trade, and of ordinary consumers who may wish to buy, that flour found to be so sour must be marked "sour," they entitle every one to infer that the inspector's brand without that addition carries with it the assurance of the flour being sweet; and when the inspector, as in this case, will not brand the flour "*No. 1 superfine*," and nothing more, he does not pass it with that brand which the plaintiff stipulated for, and which would enable him to sell the flour as coming up to the quality which we are to understand it to import when the word "sour" is not added. The difference must be one of very considerable consequence; for however bakers by profession may be able to correct the

acidity of flour by methods of treatment which are known to them, there is no doubt that such flour would not find favour with customers generally, who require it for domestic uses, and this of course injures in some degree the chance of sale.

The question raised in this case is one of consequence to persons in the trade and to the public generally, and if there is room for doubt upon it, it is well it has been presented for decision.

BURNS, J.—If the finding of the jury be of any value in determining the point as to the custom, that upon a contract for the sale of flour, where it is guaranteed to inspect No. 1 superfine, it will also include that it is sweet, then we should have a fact found which would easily enable us to interpret the meaning of the contract in question. Independent of that finding, however, I take it the legislature has in the Inspectors' Act, 19 & 20 Vic., ch. 87, given us a sufficient guide how to interpret this contract. The 14th section says, that in addition to the brand designating the *quality* the inspector shall, if the flour be found sour, without any other damage or unmerchantable quality, brand it as sour; and if it be found unsound and unmerchantable in quality arising from other causes, then he shall brand it *rejected*. The inference from this is very plain,—that if flour be neither branded as *sour* or *rejected*, but simply branded as No. 1 superfine, it must necessarily be sweet at the time it is branded. In this case the contract is that it should stand inspection at Montreal as No. 1 superfine. The question therefore is simply this, whether the buyer, to guard against the inspector putting on the brand *sour* or *rejected*, should have the word *sweet* introduced into the contract, so as to enable him to recover if branded sour, or whether the seller shall guard himself against the meaning of the legislature, that if the flour be simply marked No. 1 superfine, such brand would imply that it should at that time be sweet. On the score of convenience in litigated questions there can be no question, I think, which should be considered the most proper upon whom to cast the burthen. I take it to be

clear that the legislature meant that if flour had no other brand than that of quality, then that it should be considered as sweet. It appears to me therefore reasonable to say, that a contract guaranteeing flour to pass inspection as No. 1 superfine does not mean that it may have something else added to that which deteriorates the price of it, but that it means precisely the same thing that the legislature meant—namely, that if it passes inspection as No. 1 superfine, the necessary implication is that it is sweet. I take the meaning of this contract to be, that by necessary implication the inspector would be called upon to give the character of the flour as such that the owner could sell it as sweet at the time it passed inspection in Montreal. It has been argued that such a construction might entail trouble, and difficulty and hardships upon sellers running the risk of the mode of carriage, and the time occupied in sending to the market where the article is to be inspected. I do not see any difficulty in this respect, for it is always open to the parties to make their contract to suit their own view; and I am persuaded we do a benefit to trade in holding the construction of this contract to be that which harmonizes with the act of parliament.

I think the verdict should be entered for the plaintiff.

McLEAN, J., concurred.

Rule absolute.

### HEWITT V. CORBETT, SHERIFF.

*Assignment—Construction of—Return to Fi. Fa.*

By an assignment of all the assignor's "stock in trade, goods, wares, merchandise, groceries, household furniture, and moveable personal property in, upon, or belonging to his store, dwelling, warehouse, wharf and tenements in Ontario-street, in the city of Kingston, or elsewhere (save and except and excluding the goods and chattels of the said J. F." the assignor, "in the possession, control, or charge of David McWhirter, of Adolphustown only), and also all his stock in the Kingston Marine Railway Company."—*Held*, that shares in the Bay of Quinte Steamboat Company would not pass.

The sheriff having, however, sold such shares under execution and received the money, could not return *nulla bona*, on the ground that they were not properly saleable under the writ.

CASE for falsely returning *nulla bona* on a writ of *fi. fa.* against the goods and chattels of John Counter and James Fraser.



*Pleas*—1st. Not guilty. 2nd. Denial of seizure of goods of Counter or Fraser.

Verdict for the plaintiff, £216 11s. 6d. subject to the opinion of court on the following

CASE.

On the 11th of April, 1855, judgement was entered and a *fi. fa.* issued to defendant in Hewitt v. Counter and Fraser, which was received by the sheriff on the 16th of April, 1855, at 10 o'clock, a. m.

On the 2nd of April, 1855, Fraser executed an assignment of certain real and personal property, the words therein used to convey personally being as follow: "And this indenture further witnesseth, that for the consideration aforesaid he, the said party of the first part, doth hereby assign, transfer and convey to them, the said parties of the second part, the survivors and survivor of them, all his stock in trade, goods, wares, merchandise, groceries, household furniture, and moveable personal property, in, upon, or belonging to his store, dwelling, warehouse, wharf and tenements on Ontario-street, in the city of Kingston, *or elsewhere* (save and except and excluding the goods and chattels of the said James Fraser in the possession, control, or charge of David McWhirter of Adolphustown only) and also all his stock in the Kingston Marine Railway Company, upon and for the like trusts, &c."

Fraser was part owner of steamers belonging to the Bay of Quinte Steamboat Company, an unincorporated association. He held five shares therein. The steamers were not registered. The sheriff seized these shares under the *fi. fa.*, and the assignees claim them under the assignment. The sheriff, on the 4th of August, 1855, obtained an interpleader order, by which he was ordered to sell the shares and pay the money into court, unless the assignees paid the amount into court, or gave security for the payment of the same within ten days from date of the order.

The assignees failed to give security or pay, and the sheriff proceeded to sell, and did sell and receive the money, but did not pay it into court as required by the order.

The assignees failed to make up an interpleader issue, and go to trial of feigned issue, pursuant to the order; in short, took no action on it whatever.

In Michaelmas term, 1855, the plaintiff obtained a rule to shew cause why the interpleader order should not be set aside; and in the same term the rule was made absolute.

The plaintiff subsequently ruled the sheriff to return the *fi. fa.*, and he returned it *nulla bona*.

The questions are—

1st. Did the shares of Fraser in the steamboat company pass by the assignment.

2nd. Was the defendant justified in returning the *fi. fa.* “*nulla bona*” under the circumstances, the money having been collected by him, and being when this suit was brought under his control.

*Galt* for the plaintiff.

*S. Richards*, contra, cited *Remmett v. Lawrence*, 15 Q. B. 1004; *Wylie v. Birch*, 4 Q. B. 566; *Shattock v. Carden*, 6 Ex. 725; *Heenan v. Evans*, 3 M. & Gr. 398.

ROBINSON, C. J., delivered the judgment of the court.

The first of the two questions submitted to us is whether the share of Fraser, the execution debtor, in the stock of the unincorporated steamboat association passed by the assignment made by him to Wilson and others in trust for his creditors. We are of opinion they did not. The assignment was evidently not intended to include every thing; it only extends to such real estate as he describes, and he specially excepts some particular personal property out of it.

Then the operative words which could alone, we think, of those used, include his shares in the steamboat company would be these, “*and moveable personal property*, in or belonging to my store, dwelling, warehouse, wharf and tenements on Ontario-street, in the city of Kingston, or elsewhere.”

The words “*moveable property*,” as here used, seem to mean only things tangible and visible, and having a local situation, and not such property as shares in a company. And this construction is rather strengthened by the addition, directly after, of these words, “and also all *my stock* in the Kingston Marine Railway Company,” for this addition seems to denote that he did not consider such property would pass under any of the words he had before used.

Then if these shares did not pass by the assignment, the assignees can have no right to the proceeds of the shares upon their sale.

And we think we must look upon this special case as intended to lead to the determination of the right of the assignees to such proceeds; and that so far as this case is concerned, if they are not entitled to the money we ought to hold that the plaintiff is.

The shares it is admitted, were sold by the assent both of the assignees and of Hewitt, this plaintiff; and the sale should, we think, be regarded as made by the sheriff under the writ, the assignees consenting to take their remedy for the money they should bring, instead of looking for the property itself; and if the assignees are found by us not to have a claim to the proceeds, they are merely put out of the question, and the sheriff is left to pay over to the plaintiff what he has made under the writ.

It does not lie in his mouth to say that he has sold something that a *fi. fa.* could not under any circumstances attach upon, and our decision of the first point removes the only obstacle that has been raised to his paying over the money to the plaintiff in the writ.

Judgment for plaintiff.

### HANSCOME v. COTTON.

*Promissory note—Consideration—New trial to indorser only.*

Where the indorser placed his name upon the note while in blank, there being no maker's name attached to it, nor any sum of money or payee expressed in it, and it appeared that the name of the maker was afterwards signed without authority,

*Held*, that the indorsee suing upon such note must shew himself a *bona fide* holder for value.

In an action against maker and indorser a new trial was granted as to one defendant, and the verdict left to stand as to the other.

ASSUMPSIT on a promissory note made by James Cotton and indorsed by Robert Cotton, dated the 30th day of May, 1855, and payable six months after date.

*Pleas*—1st. That the plaintiff, after the note was indorsed to him, indorsed the same away to some person or persons unknown. 2nd. That James Cotton did not make the note. 3rd. That Robert Cotton did not indorse the note. 4th. That James Cotton made the note for his own accommodation, and in order that Robert Cotton might get it

discounted and raise money for the use of James Cotton, and without Robert Cotton having given any value: that Robert Cotton indorsed the note without any consideration, and delivered the same to one Frank H. Anderson for the purpose aforesaid, that Anderson might discount it for the use of James Cotton, and Anderson received it and held it for such purpose; that Anderson did not at any time get the note discounted for James Cotton, nor pay to James Cotton or Robert Cotton any money on account of the note, but in violation of and contrary to the term upon which he took and held the note, and without the consent of James or Robert Cotton; Anderson indorsed the note to the plaintiff, and the plaintiff first took and received it from Anderson on other and different terms, and there never was any consideration for James Cotton making the note, or for Robert Cotton indorsing it, or any value or consideration for the delivery of it by Anderson to the plaintiff, or for his being the holder of the note. 5th. The same, averring that the plaintiff at the time the note was endorsed to him had notice of all the matters stated in the plea. 6th. A similar plea to the fourth, but alleging that the note was over-due when it was transferred to the plaintiff. 7th. Plea by Robert Cotton, that the note was not duly presented. 8th. By Robert Cotton, that he had no notice. 9th. By James Cotton that the note was obtained from him by fraud. 10th. By Robert Cotton, that his indorsation was obtained by fraud.

*Replication.*—To the 4th plea *De Injuria*, and the same to the 5th and 6th pleas. Issue joined on the others.

At the first trial, before *Burns, J.*, at Toronto, a verdict was found for the plaintiff, and the court in Michaelmas Term last granted a new trial, considering that no sufficient evidence was given of the authority of one Anderson, who had signed the note in James Cotton's name as his agent.

At the second trial, at Toronto, before *Hagarty J.*, the verdict was in favour of the defendant James Cotton, the alleged maker of the promissory note sued on, and against Robert Cotton sued as indorser, for the amount of note and interest, £401 12s. 6d.

*D. B. Read* obtained a rule to shew cause why the verdict



against Robert Cotton should not be set aside, and a new trial had between the plaintiff and defendant Robert Cotton, the verdict being against law and evidence, and for misdirection, in not directing that the plaintiff should have given further evidence of value paid by him for the note before he could be allowed to recover, and in not holding that the plaintiff was bound to take notice of the illegality and fraud; and why judgment should not be entered in favour of James Cotton on the verdict given in his favour; or why a verdict should not be entered for the defendant Robert Cotton, pursuant to leave reserved.

*J. Duggan*, with him *M. C. Cameron*, for the plaintiff, obtained across rule on defendants' attorney to shew cause why the verdict in favour of James Cotton should not be set aside, and a new trial had as between the plaintiff and James Cotton, or why a new trial should not be granted on such terms between the parties as the court might think fit to order

*Wood v. Connop*, 5 Q. B. 292; *Bromage v. Lloyd*, 1 Ex. 32; *Marston v. Allen*, 8 M. & W. 494; *Adams v. Jones*, 12 A. & E. 455; *Bailey v. Bidwell*, 13 M. & W. 74; *Maulson v. Arrol*, 11 U. C. R. 8; *Rossin v. McCarty*, 7 U. C. R. 100; *Crotty v. Hodges*, 4 M. & Gr. 561; *Geohegan v. Lawson*, 13 U. C. R. 495, were cited on the argument.

ROBINSON, C. J.—As to the propriety of the verdict in favour of James Cotton upon the evidence, we do not think it admits of any doubt. It did, I own, surprise me that the jury upon the former trial could possibly have held him liable as maker of the note after hearing Anderson's own account of the matter, if there had been no other evidence.

Upon the last occasion the jury, we think, disposed of the case rightly as regards James Cotton.

Then as regards Robert Cotton, the endorser, the case is different in this respect, that his endorsement of the note is not denied by him to be genuine, though when endorsed it his brother James Cotton had not signed it as maker, nor had Anderson yet signed it in his name. Robert Cotton put his name as endorser on a note that had no maker's name to it, nor any sum of money, nor any payee's name expressed

in it. This was a kind of heedless confidence that no man should place in another; for he could not tell into whose hands the paper so endorsed by him might fall, nor the use that might in consequence be made of his signature without either his or his brother's knowledge. The consequence of his having done so is that his conduct may give rise to this question, whether he shall suffer for his imprudence, or whether an innocent person shall suffer who honestly takes the note, paying value for it, trusting in the genuineness of his signature, and knowing nothing of the manner in which his confidence had been abused.

There is no doubt that in such cases the innocent holder for value, taking the note before it was due, must be held to be protected.

But then he is called upon to shew in a case of this description that he is really a holder for value. The usual presumption, in the first instance, that value has been paid to him as indorser, will not be entertained. On the contrary it is assumed rather that he is probably suing on the note by collusion with the person from whom he took it, and for his benefit, until he shews how it was that he acquired the note, to satisfy the jury that all is fair on his part, and that he is not merely a concealed agent of the payee.

The cases of *Baily v. Bidwell* (13 M. & W. 73), *Smith v. Braine*, (16 Q. B 244), *Harvy v. Powers* (6 Ex. 656), and *Fitch v. Jones* (5 Ell. & Bl. 238), support that principle very clearly. This plaintiff is in no better position than any person would be who should be endeavouring to recover upon a note which had been lost by the payee or had been stolen from him. The law will enable a person under such circumstances to recover, when he shews clearly how and upon what consideration he became possessed of the note, and the evidence must satisfy the jury that he did really give value for it, and that there is no ground for implying collusion between him and the payee. The law does not appear to have been so stated to the jury, and there certainly is much in the evidence on that point that called for their very scrupulous attention.

We think there should be a new trial so far as Robert

Cotton is concerned, and that the rule which has been obtained for that purpose may be made absolute, allowing the verdict for James Cotton to stand. We are not aware that this point of practice has arisen under the act which allows parties liable in different capacities on a note to be sued in one action, but we think it is consistent with the spirit of the act and its other provisions, and with what we must suppose to have been the intention of the legislature, that such a course may be taken.

BURNS, J.—I was at first much disposed to think the plaintiff was entitled as a matter of law to a verdict upon the evidence given at the trial, and finding of the jury, as against Robert Cotton, because he endorsed the note in blank, and the plaintiff might have taken it on the faith of the genuineness of his signature; but the question raised by defendants' counsel, that there was misdirection in the learned judge who tried the cause, in not calling upon the plaintiff to give evidence of what value he gave for the note, is a very important one, and respecting which I entertain a very different opinion now from what I at first had upon the point. The jury have found that the note was made and issued in the name of James Cotton without his knowledge or authority, and therefore as against him was in its inception fraudulent. The evidence shews that the person to whom Robert Cotton apparently endorsed it was aware that it was a note endorsed by Robert Cotton in blank, and he knew that it was made and delivered to him without James Cotton's authority. The question then is, upon those facts being established, whether the burthen of proof was not cast upon the plaintiff to shew that he gave value to the person who transferred to him, being the person who was cognizant of how the note was given. The question put to the jury was simply whether the plaintiff was a *bona fide* holder for value. The jury have found that he was; but the question is, whether that is the right way to put the matter to the jury, and upon consideration of the cases and the reason of the thing, I am of opinion it is not. On the facts proved the presumption is that Newman would not sue upon the

note himself, but would pass it away to some one else to do so, and that presumption shifts the burthen of proof. The defendant, to make his plea good, was not only obliged to shew the fraud committed upon James Cotton in the issuing of the note: and that Robert Cotton was merely an accommodation endorser, but he was obliged to assert that the plaintiff became holder without value. Upon establishing the first part of the proposition, the inference to be drawn from that is that the plaintiff is merely an agent for Newman, and therefore the burthen of shewing that he is not is cast upon him, and the case should have been so left to the jury. I refer to the cases quoted by the learned Chief Justice.

Newman did swear that he sold the note to the plaintiff, but he did not state what the consideration was for the transfer. It was proved that he, only the day or so before the note became due, took it to the solicitor and delivered it for protest, and to be sued if not paid. He took instructions in writing in the name of the plaintiff to the solicitor, but the plaintiff himself did not inquire about the suit until after it had been instituted.

I think there should be a new trial; costs to abide the event.

McLEAN, J., concurred.

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## McPHERSON ET AL. V. CAMERON.

*Agreement—Letters.*

Defendant, in June, 1855, agreed to employ plaintiffs' vessel in carrying lumber from Bear Creek to Montreal, until the close of navigation.

Defendant afterwards went to England, leaving G. as his agent. Two cargoes had been carried, producing an average freight of £400, and there was yet time for another trip, but G. told the plaintiffs that he should not have a third cargo for Montreal. Some conversation took place, but, as the jury found, no agreement was then come to. The plaintiffs afterwards wrote G. as follows :

*September 17, 1855.*

"Dear Sir,—Mr. Gray spoke of loading the "Queen" for French Creek or Port Metcalfe this next trip, but which would not at all suit us, as it is by return freight from Montreal we expect the vessel to do any good. She is now loaded for Cleveland, where you can have the opportunity of engaging freight for Montreal, and make the same as good to us as a load of timber at 150 dollars per M., and which for the two loads we have carried amounts to £800, say £400 each. Mr. Anderson of Cleveland, to whom the 'Queen' is consigned, is directed to load her for Montreal at the best freight he can get, and which you shall have the benefit of on your contract—*i. e.*, if more than £400 you will have credit for the difference, if less than £400 we shall charge you with the difference, together with £10 per day demurrage for every day beyond three days that the vessel is detained in loading. If you prefer loading with timber *for Montreal*, and consigning to some person who will pay the freight on delivery, you have only to write to Captain Mitchell on receipt of this in course of post, care of P. Anderson, Esq., Cleveland, Ohio, and he will load for you as you may direct."

To this G. answered, on the 20th of September :

"Gentlemen,—I am in receipt of yours of the 17th instant. I have written to Captain Mitchell to take a load from Cleveland, but you mention in your letter that any thing less for the freight from Cleveland than what you would get for timber from Bear Creek, Mr. Cameron would have to make up, which I think would not be just, for what is it worth to take the vessel from Cleveland to Bear Creek and back? The towing alone would cost over 100 dollars, besides three or four days' time."

The plaintiffs, on the 1st of October, wrote again ;

"Yours of 20th ultimo came to hand in our absence, and we now beg to say in reply, that when the 'Queen' comes back we can learn from her captain what towage she has saved, which of course you can have the benefit of together with any time saved. You will bear in mind, however, that the tolls from Port Colborne to Montreal are much heavier on grain than on timber : but all things considered you shall be fairly dealt by."

The vessel was sent to Cleveland, and while there G. wrote to the master, telling him that he might do the best he could with her ; and he took in a load of corn for Montreal, which brought £170 less freight than a cargo of timber from Bear Creek would have done.

*Held*, that the letters contained no agreement on defendant's part to pay such difference ; but that the plaintiffs' remedy was on the original contract.

*Burns, J.*, dissenting, and holding that by the conduct of the parties the original agreement was put an end to, and that the facts proved, together with the letters, constituted an agreement to substitute a cargo of grain for timber, making a fair compensation for the difference.

The plaintiffs declared in assumpsit, setting forth that on the 7th of June, 1855, it was agreed between the plaintiffs and defendant that defendant should employ a vessel of the

plaintiffs' called "The British Queen" in carrying lumber from Bear Creek, on the river St. Clair, to Montreal, at the freight of £37 10s. for every thousand cubic feet of timber, payable on delivery: that defendant should place the timber at convenient points for loading, and that any detention over three days in loading or in discharging at Montreal should be paid for at £10 per day.

Other terms of the agreement were set out that have no bearing on the question raised in this case; and it was stated that it was then further agreed between the parties that the said vessel, which was then on her way up, should, after discharging a cargo of locomotives which she then had on board, proceeded to load the said timber, and should be employed by the defendant under the said agreement until the close of the season of navigation in the year aforesaid.

The plaintiff then further stated that the defendant did not perform his part of the agreement, but failed in supplying freight as he had engaged to do: that is to say, to the extent of one cargo of the timber which he was to have shipped: by means of which the plaintiffs sustained a great damage, to wit, to the amount of £400; and that after such default on his part, to wit, on the 1st of September, 1855, it was agreed that in consideration of such breach of his agreement, and of the damages which the plaintiffs had sustained from it, "the defendant should procure the vessel to be employed in carrying a cargo of merchandize or other goods to Montreal, and that defendant should make good to the plaintiffs any loss which might be incurred of the freight so to be carried by the vessel in carrying the said cargo of merchandize, in case the said freight should not amount to the said sum of £400, which would have been earned by the said vessel in carrying the said cargo of timber; and that if the freight so to be carried by the said vessel as last aforesaid should exceed the said sum of £400, then the defendant should have credit for such excess in accounting with the plaintiffs."

The plaintiffs then averred mutual promise to perform this last mentioned agreement, and that the defendant, in pursuance of it, did procure the vessel to be employed in carrying a cargo of wheat from Cleveland to Montreal, at a

certain freight viz., £200; and they claimed the difference between what the vessel earned on that voyage and what she could have earned in carrying a freight of timber as originally agreed upon, and alleged that defendant refused to pay such difference after notice.

The declaration contained also common counts, among them one for freight, and one for demurrage.

The defendant pleaded—1st. *Non-assumpsit*. 2nd. Payment.

At the trial at Kingston, before *Robinson*, C. J., it appeared that the facts were as follows: The plaintiffs and the defendant did make, on the 8th of June, 1855, such an agreement as is set out in the commencement of the declaration.

The defendant sometime afterwards went to England, leaving one Gray as his agent to manage the business in which he was engaged. Two cargoes of timber was supplied to the "British Queen" from Bear Creek to Montreal as agreed upon, and those trips produced an average freight of £413 12s. 6d. to the plaintiffs as owners of the vessel. About the 10th of September Gray went to the plaintiffs at Kingston, and told them that he should not have a third cargo of timber for Montreal—there being yet time during the season to carry a third cargo—but that he would supply a cargo of timber to be taken only as far as Garden Island, near Kingston.

The plaintiffs' told him that would not answer their purpose, because they depended on a return cargo of merchandise from Montreal.

On the plaintiffs' part one of their clerks swore that before Gray left Kingston he did verbally agree with Mr. McPherson, one of the plaintiffs, to make good any difference of freight as alleged in the declaration.

On the defendant's part, Gray, who was examined as a witness, swore that he made no agreement whatever at Kingston about the payment of any difference, and had no intimation that any such claim would be made until he received a letter from the plaintiffs to that effect, which he answered, rejecting the claim, and giving his reasons.

The plaintiffs produced and proved the correspondence

alluded to, and relied on that also for proving the making of the substituted agreement declared upon, if the jury should not be satisfied by the evidence that a verbal agreement to the same effect had been made between the plaintiffs and Gray, the defendant's agent, in the interview which took place at Kingston.

The first letter was one from the plaintiffs, dated the 17th of September, and addressed to the defendant or his "agent" at Port Sarnia. It ran thus :

"DEAR SIR,—Mr. Gray spoke of loading the 'Queen' for French Creek or Port Metcalfe this next trip, but which would not at all suit us, as it is by return freight from Montreal we expect to do any good. She is now loaded for Cleveland, where you can have the opportunity of engaging freight for Montreal, and make the same as good to us as a load of timber at 150 dollars per *M.*, and which for the two loads we have carried amounts to £800, say £400 each. Mr. Anderson of Cleveland, to whom the 'Queen' is consigned, is directed to load her for Montreal at the best freight he can get, and which you shall have the benefit of on your contract: *i.e.*, if more than £400 you will have credit for the difference, if less than £400 we shall charge you with the difference, together with £10 per day demurrage for every day beyond three days that the vessel is detained at loading. If you prefer loading with timber for Montreal, and consigning to some person who will pay the freight on delivery, you have only to write to Captain Mitchell on receipt of this in course of post, care of P. Anderson, Esq., Cleveland, Ohio, and he will load for you as you may direct."

On the 20th of September Mr. Gray wrote in answer to the plaintiffs as follows :

"GENTLEMEN,—I am in receipt of yours of 17th instant. I have written to Captain Mitchell to take a load from Cleveland, but you mention in your letter that anything less for the freight from Cleveland than what you would get for timber from Bear Creek Mr. Cameron would have to make up, which I think would not be just, for what is it worth to take the vessel from Cleveland to Bear Creek and back? The towing alone would cost over 100 dollars, besides three or four days' time."

To this the plaintiffs replied by letter of the 1st of October, addressed to Mr. Cameron "or his agent," as follows :

"Yours of 20th ultimo came to hand in our absence, and



we now beg to say in reply that when the 'Queen' gets back we can learn from her Captain what towage she has saved, which of course you can have the benefit of, together with any time saved. You will bear in mind, however, that the tolls from Port Colborne to Montreal are much heavier on grain than timber ; but all things considered, you shall be fairly dealt by. We much fear the vessel will meet with great detention, and wish Mr. Gray had made a point of going to see that no avoidable delay should occur. Mr. Anderson is a most reliable agent, but failing of freight at Cleveland, Mr. Gray might have found it at Toledo or Detroit."

After taking the two loads of timber the "British Queen" was sent up with a cargo of salt to Cleveland, and with instructions to the master to wait there until he should receive a letter from Gray, defendant's agent.

The master swore that a letter came to him from Mr. Gray, telling him that he might do the best he could with the vessel, and that he took in at Cleveland a load of corn for Montreal.

The plaintiffs put in a statement, shewing that they had lost £172 2s. by the difference of freight in the cargo carried as compared with a cargo of timber from Bear Creek, including a charge for £20 for two days' detention at Cleveland ; and they claimed that amount with interest.

The defendant's counsel moved for a non-suit, on the ground that the alleged second agreement declared upon was not proved. The learned Chief Justice left it to the jury to say whether any such agreement as was declared upon was in fact made verbally between the plaintiffs and the defendant's agent at Kingston, and they found that there was not such an agreement made verbally.

Whether the letters could be taken to constitute such an agreement was then the question. The learned Chief Justice assumed at the trial that they might betaken to amount to it, but so ruled subject to the opinion of the court upon that point, and the jury gave their verdict for the plaintiffs for £170.

It was not objected that Mr. Gray had not authority to bind the defendant by any such special undertaking ; and the learned Chief Justice told the jury that looking at the circumstances he thought there was no difficulty upon that

point : that the claim seemed to be a perfectly just one ; and that the only ground for doubt was whether the letters could be said to form a final agreement such as was declared upon or whether the plaintiffs were not left to their action against the defendant for his breach of the first agreement.

*Richards* obtained a *Nisi* to enter a non-suit upon the leave reserved, or for a new trial on the law and evidence. He cited *Cheveley v. Fuller*, 13 C. B. 122.

*Kirkpatrick*, Q. C., shewed cause, and cited *Dunlop v. Higgins*, 12 Jur. 295 ; *Kennedy v. Lee*, 3 Mer. 441.

ROBINSON, C. J.—Both parties are right as to the general principles they contend for. An agreement may be gathered from a correspondence between parties upon a business of this kind, that will be as perfect and as binding as if a regular covenant had been drawn up and signed by both parties ; but then it must appear by the correspondence that what has been proposed on the one side has been definitively agreed to upon the other, so that a clear and complete covenant can be derived from the letters ; and whenever it is left doubtful whether the correspondence does shew a perfect agreement, or whether it amounts to nothing more than a treaty, which not having resulted in a final understanding is not binding on either party, that is a question of law which must be decided by the court.

I think the jury came to a correct conclusion in finding that no such special agreement as last declared on was come to between the plaintiffs and Gray, the defendant's agent, on the occasion when Gray went to Kingston and informed the plaintiffs that the defendant would have no more timber to send down from Bear Creek. He told them that the defendant would be unable to provide a freight of timber down to Montreal as he had engaged to do ; and no doubt there was some discussion between them as to what it would be best to do under the circumstances ; but the first letter from the plaintiffs (17th of September, 1855,) to Mr. Gray, written after that interview, strongly supports his evidence that nothing had been settled between them as to what should be the consequence of the defendant failing in his engagement.

Now we have to look at the letters and see what they amount to.

1st. In their letter of 17th of September the plaintiffs say in effect, "As you can't make up a third load of timber according to your agreement, you had better consider well what it would be most for your advantage to do with the vessel; for if we take in a down freight from Cleveland such as we can get, we must hold you liable for what that freight may produce to us less than a load of timber from Bear Creek to Montreal would have done. If it should happen to produce more we will pay you the difference."

2nd. Then the defendant (through his agent) says in answer to this, "I have sent word to your captain that he may take down a load from Cleveland (or, in other words, as I understand him to mean, I shall not change his destination, or interfere with any directions you may have given to him), but as to paying you the difference as you suggest, that would not be just, for the following reasons." This I take to amount to this, "I cannot agree to that: I will tell you why."

Now those two letters, it appeared to me at the trial, could not be said to form an agreement; for it could not be said that they shewed a proposition on the one side and accepted on the other.

The plaintiffs' counsel had at first, as he thought, no other letter to shew; and though I felt the plaintiffs' claim to be quite just and reasonable in equity, I felt that I must certainly decide against him, for they did not seem to me to have proved such a second agreement as they had declared upon.

Then after the evidence was closed, as we supposed, there was found among the papers a copy of a third letter—that of the 1st of October, from the plaintiff to Mr. Gray, in reply to the letter of the 20th of September. I hoped that might be taken to supply what was wanting. I thought at first at the trial that it would be found sufficient, though on further consideration I was less confident. The defendant's counsel still earnestly pressed his objection as ground of non-suit, that no such special agreement as was declared upon was proved; and it was agreed that this third letter should be

admitted to have been sent by the plaintiffs and received by Mr. Gray, and that on the whole it should be left to the court in banc to say whether the three letters made out the agreement declared on.

3rd. Now this third letter, when it is carefully considered, seems to amount to this :

The plaintiffs in effect say, in reply to defendant's answer, " We have considered your *reasons* for not agreeing to our proposition. You shall receive the benefit of towage saved, and time saved in taking down a freight from Cleveland instead of from Bear Creek ; but there is another thing to be thought of, we shall have much heavier tolls to pay from Port Colborne down upon grain than we shall have had to pay on your timber, so that is something that should be set against your claim for deduction, *but all things considered you shall be fairly dealt by.*"

There the correspondence closes ; and nothing was shewn to have been said or done by Gray afterwards that could be laid hold of as shewing an acquiescence in the condition last suggested by the plaintiffs, that the plaintiffs should have credit, in adjusting the damages, for any *higher* charges they should be put to in consequence of taking down a freight of grain than they would have been put to on a freight of timber. The closing assurance that " all things considered the defendant should be fairly dealt by," seems to me to leave the whole matter open and inconclusive, and to bring it to this :

The defendant stands in the position of having broken his contract of June, 1855, and liable to pay the plaintiff such damages as resulted from it.

The parties have endeavoured to come to an amicable understanding as to what should be done under the circumstances, but did not agree upon terms.

The defendant's agent might, and perhaps did think that the mode of settlement which the plaintiffs contended for was reasonable ; but it cannot be said, I think, that he did in any manner express or shew his acquiescence, and I take the consequence to be that the defendant is left to stand the consequence of his breach of the original agreement. I am



sorry that I can come to no other conclusion, for I think what the plaintiffs have recovered is just the compensation which the defendant should make for the disappointment, and a jury in an action on the original agreement would probably give that very amount of damages which the plaintiffs claim, and very possibly think it not unreasonable to give something more; but the question coming before us as it does upon a legal point reserved, we must determine it as we think it ought to have been determined by the judge at the trial, and my opinion is that on the legal objection the plaintiffs should be nonsuited.

I refer to the cases of *Cooke v. Oxley* (3 T. R. 653), *Head v. Diggon* (3 M. & Ry. 97), *Cheveley v. Fuller* (13 C. B. 122), *Routledge v. Grant* (4 Bing. 653), *Wontner v. Shairp* (4 C. B. 404), *Duke et al. v. Andrews* (2 Ex. 290), *Chaplin v. Clarke* (4 Ex. 403).

McLEAN, J.—From the tenor of the plaintiffs' letter of the 17th of September it is pretty clear that no parol contract had previously been entered into for the employment of the vessel, and the payment of the difference of freight by defendant, as alleged in the declaration, for had such contract been entered into the plaintiffs would scarcely have referred to a proposition of Mr. Grays to load for French Creek or Port Metcalfe as one that would not suit them on account of the want of return freight. It is, as it appears to me, a proposition coming from the plaintiffs as to the employment of the vessel by the defendant, and a declaration of what the plaintiffs would expect to receive from the defendant if employed by him otherwise than in carrying timber. They place the vessel subject to his orders on her arrival at Cleveland; but they say, "Mr. Anderson, of Cleveland, to whom the 'Queen' is consigned, is directed to load her for Montreal at the best freight he can get, which you shall have the benefit of on your contract"—meaning, of course, the original contract for carrying timber; and having placed the vessel at defendant's disposal, they say, "If you prefer loading with timber for Montreal and consigning to some person who will pay the freight on delivery, you have only to write to Captain

Mitchell on receipt of this, and he will load for you as you may direct." The *direction* from plaintiffs to Mr. Anderson to load the vessel for Montreal at the *best freight he could get*, seems to be wholly inconsistent with the idea of the defendant's having agreed to procure a cargo at Cleveland, as alleged under the second agreement stated in the declaration, and amounts, as it appears to me, only to a notification that Mr. Anderson had been directed by the plaintiff to procure and send a cargo for Montreal, but if the plaintiff preferred, that he might send a cargo of timber to any one at Montreal who would pay the freight on receipt. If it had been previously agreed that the defendant was to *procure* the cargo, as alleged, the plaintiffs would most probably have contented themselves with giving notice of the departure of the vessel for Cleveland, and requesting defendant to be prepared with a cargo when she arrived. Then regarding the letter as a mere proposition, is there any evidence to support the allegation that the defendant undertook that he would procure the vessel to be employed in carrying a cargo of merchandize or other goods to the port of Montreal, and that he, defendant, would make good to the plaintiffs any loss which might be incurred in the difference of freight? In the reply of defendant's agent, so far from acceding to the plaintiffs' propositions in that respect, he says that he thinks it would not be just to charge the defendant with such loss; and he points out the expense of taking a vessel from Cleveland to Bear Creek, and of towing at Bear Creek, and the difference of time in the two voyages, as reason why he thinks the charge would be unjust; but he does not, in stating specific objections to the proposition, intimate in any way that if these were removed the claim of the plaintiffs would be acceded to. The letter of the plaintiffs of the 1st of October conveys their assent to make due allowances for the expense of towage and time saved, but points out that the tolls from Port Colborne to Montreal are *much heavier* on grain than lumber, and says that *all things considered* the defendant *shall be fairly dealt by*. Now these tolls form part of plaintiffs' claim, and reduce the amount of freight received for the cargo of grain from Cleveland; and there is nothing

to shew that the defendant ever consented to be charged with the higher tolls stated by the plaintiffs to be chargeable on grain in passing through the canals. There is indeed nothing to shew that the defendant's agent was at all aware of the description of cargo to be taken from Cleveland, or that it must necessarily be a cargo of grain. He says, in his reply to the plaintiffs' letter, that he had written to Captain Mitchell to take a load from Cleveland, but the *kind* of load was a matter left entirely to the master ; and the letter seems, from the testimony of Gray, to have been intended only as a notice not to depend upon any cargo from the defendant. As the Captain was directed to await the defendant's directions, it was proper on the part of Gray to notify him that he might look for a cargo in Cleveland, as the defendant had none to send ; but I do not think his letter can be taken as a *direction* to Captain Mitchell to take on board a cargo on account of defendant. If Gray had intended to give such a direction, he would surely have accompanied it with some specific instructions as to the terms on which the cargo was to be taken, the payment of freight, &c. ; but no such instructions were given, and the master was merely told that he *might* take a cargo from Cleveland. The defendant or his agent had nothing to do in procuring or in arranging for the carriage of that cargo : the consignee of the plaintiffs' vessel, or the master, seems to have managed with respect to it without any reference to the defendant or his agent. How then can it be said, as it is said in the declaration, that the defendant did procure the vessel to be employed in carrying a cargo of wheat from Cleveland to Montreal, in pursuance of the alleged second agreement ? Anderson the consignee of the vessel at Cleveland, who was instructed by the plaintiffs to load for Montreal, was the agent of the plaintiffs, not of defendant, and any thing done by him in procuring a cargo could not bind the defendant. If in truth there was a second agreement such as the declaration alleges, and the defendant did not procure a cargo for the vessel according to the terms of that agreement, then he is responsible for the breach of his contract ; but he cannot be held accountable to the plaintiffs for the difference of freight on a cargo of timber and the

freight on a cargo of merchandise *procured* by the plaintiffs, for that is not the contract declared on. If the plaintiffs are entitled to damages (and on the evidence they certainly appeared to be entitled) it must be for a breach of the original contract with the defendant to employ the vessel in carrying lumber from Bear Creek to Montreal during the residue of the season of navigation of 1855, at a stipulated price. In such an action the plaintiff would be entitled to shew, as they have shewn on the trial of this case, what the vessel actually earned, and what she would have earned under the contract with the defendant, and the difference would form the measure of damages for the consideration of a jury; but as there does not appear to have been, either verbally or in the letters, any such contract as the plaintiffs seek to recover upon, I think the application for a nonsuit must prevail.

BURNS, J.,—No doubt without the letters there might be a difficulty in saying that such agreement as stated was sufficiently proved; but taking the evidence given at the trial for the purpose of enabling the court to construe the letters, together with the letters, I must say I think there is an agreement established, so as to enable the plaintiffs to recover the difference between the price of carrying a cargo of wheat and a cargo of timber. It is not denied that the defendant had chartered the vessel for the season, and if the plaintiffs had not consented to employ the vessel in order to save the defendant furnishing her with a third cargo of timber, he would have been bound to compensate the plaintiffs for the loss of the third cargo. The question whether there be any existing agreement like that now claimed to be the case, depends in some measure upon the proposition whether the first agreement was put an end to or not. Now it appears to me, after what took place between the parties, the plaintiffs could not resort to the original contract. It was proved that before any of the letters were written the agent of the defendant met the plaintiffs at Kingston, and apprised them that the defendant could not freight the vessel with a third cargo of timber to Montreal, but that he could do so with a cargo for Garden Island near Kingston. The latter would



not answer the purpose of the plaintiffs. The plaintiffs thought they could procure a load of grain at Cleveland, and it was arranged that the vessel should proceed to Cleveland and there await the orders of the defendant's agent, the agent agreeing that if such a load could not be had there, then the vessel might proceed to the St. Clair, and the agent would load her with timber for Garden Island. The vessel did proceed to Cleveland, and the defendant's agent states that he sanctioned the vessel taking a load from Cleveland. I apprehend after that the plaintiffs could no longer complain of not being furnished with a load of timber to Montreal upon the original contract, upon the ground that the contract was still in force.

The next question is, whether the parties were left without any agreement between them in consequence of what took place, or whether the letters, with the facts proved, will establish a substituted agreement. In this respect this case differs from the case of *Cheveley v. Fuller* (13 C. B. 122). In that case the parties had no previous understanding whatever between them, and the contract must be entirely established by the letters; and inasmuch as one important feature was not settled, viz., the time when to go into operation, there was no complete contract. Now here there existed a complete contract, and the question is as to the variation of it. Both parties knew the original contract could no longer be complied with. The plaintiffs were willing to send the vessel to Cleveland, and endeavour there to obtain a cargo of grain to be carried to Montreal; the defendant was willing to furnish a cargo of timber from St. Clair as far as Garden Island. It was agreed that the vessel should at all events proceed to Cleveland and there be subject to the defendant's orders. Nothing was spoken of up to this time about the defendant paying any difference between the two descriptions of cargo. This was the position of the parties before any of the letters were written. In the first letter of the plaintiffs they are very specific in what respects they would expect compensation from the defendant, and apprise him that the vessel would be at Cleveland subject to his order, and that he must notify the captain, by letter addressed to

him at Cleveland, what he was to do. The defendant's agent authorised the captain of the vessel to take a load from Cleveland instead of taking a freight of timber. Now it does not appear that the agent apprised the master of the vessel of his dissent from the terms which the plaintiffs notified the defendant would be expected from him if the vessel carried the grain, but the master was left to act upon the sanction to load there. He authorises the captain of the vessel to complete his cargo, and expostulates with the plaintiffs as to the terms on which they told him the vessel might take the grain instead of the timber. It is very true that the letter which is the acceptance of a proposal must accept the *terms* of the proposal in order to make a valid and complete contract, and that if a new term be introduced something in addition then is required to confirm the contract. The letter of the agent of the defendant does not accept the terms stated by the plaintiffs upon which the wheat was to be carried, but it certainly does, as I think, accept the proposal to change from a freight of timber to that of a cargo of wheat or grain. This letter does not, as it appears to me, reject the terms proposed, but amounts to an expostulation with the plaintiffs as to the charges contemplated. It is an acceptance in part, and an acceptance, in so far as the master of the vessel is concerned, that the plaintiffs would necessarily be put to great inconvenience and expense in unshipping the cargo the master was authorised to take if they looked upon the letter as an entire rejection of their proposal. It was an acceptance by the defendant in part, which was acted upon, and acted on no doubt without any knowledge that any remonstrance as to the terms had been made to the plaintiffs. If the case had rested, however, upon these letters, then the question would have been, though the original contract between the parties was at end, yet whether the plaintiffs and the defendant had so conducted themselves that they could say there was a new contract substituted upon which they could claim compensation. I am disposed to think they could not. The letter of the defendant's agent, however, expostulating with the plaintiffs as to the terms, goes on to explain why the contemplated charges would be unjust, and

evidently does not reject the proposed terms, but invites a discussion upon them, as I should understand it by its mode of reasoning, with the plaintiffs. Accordingly, upon this the plaintiffs reply, on the first of October, and say, "When the 'Queen' gets back we can learn from the captain what towage he has saved, which of course you can have the benefit of, together with any time saved. You will bear in mind, however, that the tolls from Port Colborne to Montreal are much heavier on grain than timber; but all things considered you shall be fairly dealt by." To this letter the defendant made no reply, but allowed the vessel to take the cargo of grain instead of timber. The captain of the vessel, in the meantime, acted upon the instructions conveyed to him by the defendant's agent, and freighted the vessel to Montreal. I look upon all these facts as constituting an agreement between the parties that a cargo of grain for that trip should be substituted for timber, with the terms upon which the change was made to be adjusted according to what should be fair between the parties. The defendant thought the plaintiffs were at first asking too much, though he sanctioned the change of freight, and remonstrated about the terms. The plaintiffs, in reply, say that all things taken into consideration the terms shall be fair. The defendant on this allows his instructions to remain, and the master and proprietors of the vessel act upon it. It appears to me the plaintiffs, under these circumstances, do make out an agreement for compensation for difference between the two descriptions of cargo, upon the terms of a fair adjustment being made, taking all things into consideration; and the effects of such an agreement is, if they cannot agree between themselves as to the terms of a fair adjustment upon proper principles, then I apprehend it remains for a jury to settle for them. For these reasons I think the verdict should stand.

Rule absolute.—BURNS, J., dissenting.

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## ROGERS V. HOOKER ET AL.

*Carriers by water—Loss of ship—Expense incurred by master in saving and forwarding the cargo—Liability of freighters therefor—Lien.*

Where a vessel carrying goods is stranded and lost by stress of weather, the master may, to save the cargo, employ another vessel to take it to the place of destination, and the owners of such goods will be liable for any extraordinary expense so incurred in addition to the freight.

*Declaration* against defendants as common carriers, charging that the plaintiff delivered to them certain goods, to be carried from Montreal to Cobourg, and there delivered to the plaintiff, within a reasonable time, dangers of navigation excepted, and that they did not so safely carry or deliver said goods, although no dangers of navigation prevented, but through their negligence the same were wholly lost to the plaintiff.

It appeared that the goods were shipped at Montreal, with the goods of several other persons, on board defendant's vessel, which, without any negligence on the master's part, was driven on shore between Kingston and Toronto, and became a total loss. The master, in order to save the goods, procured another vessel, by which they were taken to Cobourg; and the defendants there, in addition to the freight agreed on, claimed from plaintiff his share, upon an average, according to the value of the goods of the several freighters which were saved, of the charge of transporting his goods from the wreck to Cobourg. The plaintiff paid the charge for freight only, but refused to pay the extra claim or execute an average bond and the defendants detaining the goods, he brought this action.

*Held*, that the plaintiff was liable to such charge, and that defendants had a lien upon the goods for it.

*Quære* per *Robinson*, C. J., whether if the plaintiff was not so liable, the declaration was properly framed to entitle him to recover.

*Per Burns*, J.—The declaration was sufficient, and under a plea of not guilty defendants could not set up their lien.

CASE against defendants as common carriers.

The declaration stated that on the 1st of October, 1854, defendants were common carriers by water between Montreal and Cobourg, and other places on Lake Ontario: that the plaintiff delivered to them a large quantity of bar-iron and stoves, to be carried from Montreal to Cobourg, and to be delivered to plaintiff there within a reasonable time, and that defendants accepted and promised to carry the same securely, and to deliver the said iron and stoves as aforesaid, and that it then became the defendants' duty safely and securely to convey and deliver the same, all and every the dangers and accidents of the seas, rivers, and navigation of whatsoever nature excepted. And the plaintiff charged as a breach, that defendants neglecting their duty in that behalf, although no dangers or accidents of the seas, rivers, or navigation of any nature or kind, prevented the safe carriage or delivery of the said bar-iron and stoves as aforesaid, did not safely or securely carry or convey within such reasonable time as afore-



said, or at any other time, the said bar-iron and stoves from Montreal aforesaid to Cobourg aforesaid, nor at Cobourg aforesaid safely or securely deliver the same for the plaintiff, although such reasonable time as aforesaid had elapsed before the commencement of this suit, but so negligently and improperly behaved and conducted themselves in that behalf that by and through the negligence, careless and improper conduct of the defendants in the premises, the said bar-iron and stoves then became and were, and are wholly lost to the plaintiff, to his damage, &c., &c.

Defendants pleaded—1st. Not guilty. 2nd. Traversing the acceptance of the goods to be carried on the terms alleged. 3rd. That the goods were received to be carried subject to the dangers of navigation, and were wholly lost and destroyed by the perils and dangers of the navigation, without any negligence or improper conduct of the defendants. 4th. As to 20 tons of iron and 20 stoves, parcel, &c., that they were received to be carried subject to the dangers of navigation, and were wholly lost by such dangers, &c. 5th. As to the residue of the goods, that they were received subject, &c., (as before), and that the vessel of the defendants in which they were being carried from Montreal to Cobourg was wholly wrecked and lost by the dangers and accidents of the navigation between Montreal and Cobourg, to wit, on Lake Ontario, and that the said goods were thereby delayed in the course of being so carried without any improper conduct of the defendants; and so the defendants say that by reason of the loss of the said vessel by the dangers and accidents of the navigation aforesaid, and for no other reason, they were unable safely and securely to deliver the said goods to the plaintiff at Cobourg aforesaid:—And the defendants further say that the said iron and stoves, residue, &c., in plea mentioned, were saved at great expense by the defendants from destruction and loss from the said dangers and accidents of the navigation on the occasion aforesaid, and were afterwards, and as soon as they reasonably could be, delivered by the defendants at Cobourg aforesaid for the plaintiff, subject to such necessary and proper charges as were incurred necessarily by the defendants in saving the

said goods from destruction and delivering the same at Cobourg aforesaid for the plaintiff, of all which the plaintiff then had notice.

The plaintiff replied *de injuria* to the last three pleas.

Upon the trial, at Kingston, before *Robinson*, C. J., the plaintiff proved by a wharfinger at Cobourg, that the bar-iron and stoves in question came to him by Land in waggons from Port Hope in January, 1855, with directions that he was to hold them subject to the order of these defendants. They were addressed to the plaintiff, a merchant at Peterborough, and had been landed at Port Hope from the schooner called the "Sarah Anne Marsh."

The plaintiff, after the goods had got into the possession of the wharfinger at Cobourg, called upon him and demanded them. He paid the charge for freight to Cobourg in the steamer "Ontario," in which they had been shipped from Montreal, and offered to pay also the charge incurred for the goods at Port Hope, and for transporting the same by land from thence to Cobourg; but the defendants made a further claim for the plaintiff's share upon an average according to the value of the goods of the several freighters which were saved, of the charges of transporting his goods from the wreck of the "Ontario" near Nicholson's Island, between Montreal and Cobourg, where she was stranded and lost, and of carrying them to Port Hope. The wharfinger at Cobourg (Lambert) being instructed not to deliver the goods without the defendants' order, and the defendants insisting on this further charge, this action was brought in consequence. The plaintiff proved the goods in question to be of the value of £425 3s. 11d.

The defendants, on their part, proved that their steamer "Ontario" left Montreal with the stoves and bar-iron of the plaintiff on the 15th of November, 1854, having also goods on board for many other persons. She got safely to Kingston, and left that port for Cobourg on the 24th of November, having been detained a few days at Kingston for repairs to some part of her machinery, and to the boilers. On her way up the lake she encountered a heavy gale from the south-west, which compelled her to seek shelter under

the lee of Nicholson's Island, and the gale increasing, she dragged her anchor and struck on a bar, and in order to prevent her going to pieces the captain was compelled to slip his cable and let her swing around off the bar, or reef, by which means he was enabled to run her upon the beach of the island. Some goods of a perishable nature which he had on board, such as sugar, were destroyed by the water, but all the plaintiff's goods were saved, and with the goods of other owners were shipped after several days' detention on board of two schooners which were procured by the captain's exertions, and were sent to Toronto, to which place most of the goods had been consigned. The steamer was a total loss.

The master swore that his stranding the steamer, as he did, was his only resource for preventing a total loss of the cargo. The captain of the "Sara Ann<sup>e</sup> Marsh," one of the schooners, after landing at Toronto the goods which belonged to that port, went back to Port Hope with the goods of the plaintiff, and landed them there, subject to the defendants' orders. This vessel had been engaged at Kingston at £22 10s. per day to perform this service, which at that season of the year was dangerous. His charge came in all to £517 10s. He swore that he thought the plaintiff's goods must have been lost if they had not been taken out of the steamer. An insurance agent was called as a witness. He had visited the "Ontario" as she lay aground, and while the schooner was taking out the cargo. The plaintiff also was there, and being asked what he meant to do with his iron, said all he wanted was to get it ashore any where, and it was put on board of the schooner with the other goods. In March following this witness, who was engaged, it seemed, in making arrangements for protecting the interests of the parties concerned, applied to the plaintiff to sign a bond, undertaking to pay his share of the expenses attending the saving of the cargo as soon as an average could be struck. Such a bond had been signed by the owners of other goods; but the plaintiff refused to sign it, saying that he had *paid the defendants* their freight, and that they were obliged to deliver his goods.

The witness told him that on executing the bond he would

receive his goods : that such was the customary course : that the amount to be contributed by each depended upon the value of the goods saved, which could not be settled till the condition of the whole had been examined, which usually occasioned delay, and that in the meantime it was customary to take the bonds of the several parties before delivering them their goods. Except the plaintiff all the owners of the goods saved in the " Sarah Anne Marsh " from the wreck of the " Ontario " had executed the bond required. The freight was to contribute also. Another witness swore that he was sent to procure the plaintiff's signature to an average bond : that he declined to execute it, but said he would write a letter agreeing to pay any proper charges for saving the goods. Such a letter was afterwards sent to him to sign, with an assurance that he would get his goods if he wrote a letter to that effect, but he declined to do so.

It was endeavoured to shew that the steamer " Ontario " was unseaworthy, and that she was unskilfully managed, and was wrecked in consequence of the want of care or proper conduct of the master, and much of the evidence bore upon that point.

At the conclusion of the case the learned Chief Justice told the jury that, looking at the circumstances, he thought the action should rather have been for wrongfully detaining the goods after their arrival at Cobourg, than for an alleged loss of them by the defendants' negligence, for that in fact they were not lost, but were carried to their place of destination and detained there for charges ; and the question was whether the payment of those charges could legally be exacted as a condition for delivering the goods : that if the necessity for incurring such charges was produced by the misconduct or negligence of the master of the " Ontario," that might entitle the plaintiff perhaps to maintain the action in its present form, though he apprehended it would not in strictness. Yet as no objection had been urged on that ground he should for the present assume that it would, and would leave it to the jury on the question of negligence or no negligence as applied to the stranding at Nicholson's Island. If the loss of the steamer could, upon the evidence, be justly imputed to want of care or skill in the master, or



to unseaworthiness in the vessel, so that it did not come properly within the exception of perils of the navigation, then he recommended the jury to find for the plaintiff, otherwise for the defendants.

He observed further, that the contract was to deliver the goods at Cobourg: that the goods were carried there, and so the freight was earned, unless the defendants failed to deliver the goods to the plaintiff there wrongfully, and for no justifiable reason. If the goods were only detained till such charges should be paid as the plaintiff was liable for, and if the plaintiff was made aware of the claim, then there could be no ground for this action.

He remarked that the dangers of navigation were excepted in the most comprehensive terms, and that the defendants would not lose the benefit of that exception by reason of their master not having perhaps taken the most judicious course, in the opinion of others, under circumstances of imminent peril: that it must be evident misconduct or negligence, or inexcusable want of skill, (not a mere error in judgment) or decided unseaworthiness in the vessel, which would take a case out of the exception of perils of the navigation where actual stress of weather was shewn—such cause, in short, as might prevent a recovery against insurers.

The jury found that there was no negligence or misconduct that led to the stranding of the steamer, and they gave their verdict for the defendant, finding specially that the value of the plaintiffs' goods detained was £425; and it was agreed between the parties that it should be left to the court to determine whether the plaintiff was entitled to a verdict notwithstanding the finding of the jury, on the ground that the defendant could not legally claim payment of his proportion of the charges paid for transporting the goods in the schooner to Port Hope.

*Phillpotts* obtained a rule *nisi* to enter a verdict for the plaintiffs pursuant to leave reserved, to which *M. Vankoughnet* shewed cause. *Kirkpatrick*, Q. C., supported the rule.

The authorities referred to are cited in the judgments.

ROBINSON, C. J.—If the defendants, as owners of the *Ontario*, and entitled to the freight, have a right to claim

from the plaintiff his proportion of the extraordinary expenses incurred in saving his goods and forwarding them to their destination, then I have no doubt that such expenses constituting in effect an increase of the charge for freight, the defendants had a right of lien upon this cargo, and could well refuse to deliver it until they were paid. Mr. Arnould, on his treatise on Insurance, Vol. II., 949, takes the law to be so ; and in Abbott on Shipping, 6th Ed. 452, it is stated that where there are several consignees, it is usual for the master, before he delivers the goods, to take a bond from the different merchants for payment of their portions of the average when the same shall be adjusted. This is exactly the course which the defendants desired to take in the present case ; and if the plaintiff had given his bond as the others did, or even written a letter to say that he would pay the charge when the average was adjusted, the evidence shews that he could have obtained his goods.

The only question then to be considered is, whether the charge made by the defendants was one that could be legally insisted on. In my opinion it was. It is singular that no case appears to have arisen in England in which the right under circumstances such as occurred in this case, to charge increased freight to the owners of cargo saved from the wreck, and forwarded in another ship to the place of destination, has been the point in question. There have been many cases, however, in which the duty of the master under such circumstances to do the best he can for the interest of all concerned has been extensively discussed, chiefly, however, where the master had taken upon himself to sell the goods, either on account of their being damaged, or because he considered that the inevitable delays and difficulties in the way of forwarding the goods to their place of destination justified him in giving up the attempt. Enough, I think, appears in the language of the court in these cases to justify the conclusion, that whatever responsibility it may become the duty of the master to assume in a case like the present, where in consequence of the total loss of the ship in which the goods were being carried *her* further prosecution of the voyage had become impossible,

he has the privilege of assuming the responsibility of determining whether it is not for the benefit of the owners of the cargo that he shall, if possible, save their goods from the stranded vessel, embark them in another, and so forward them to their place of destination.

Of course if he is either expected or allowed to exercise a reasonable discretion in such cases, the law means that he shall be safe in doing so, which he would not be if he or his owners must be left to bear all the extraordinary expenses incurred in saving and forwarding the property. But though the point does not seem to have ever yet called for a judicial decision in England, the Court of King's Bench, in the case cited on the argument, of *Shipton v. Thornton*, (9 A. & E. 337), intimated their opinion, and without much hesitation, that in a case like that before us the owner of the cargo must pay the increased freight occasioned by measures necessarily resorted to.

There the ship in which the goods were first shipped at Singapore for England was disabled from prosecuting the voyage for England, and at Batavia the defendant's goods were on that account shipped in two other vessels, and carried and delivered safely to the consignee. It so happened that the goods were carried in the two vessels in which they were re-shipped at a cheaper rate of freight than the defendant was to have paid for them in the original ship; and the defendants on that ground rather ungenerously objected to pay the plaintiff, who was owner and master of the original ship, the full rate of freight agreed upon at Singapore, contending that the transshipment was a breach of his contract by which he lost the benefit of its precise terms, and that he could claim only in respect of the latter part of the voyage the freight which he had paid to the two vessels which he had employed. The court, however, held otherwise, and held him entitled to the whole freight originally contracted for; and Lord Denman, in an elaborate judgment, touched upon the question as to what would have been the right of the owner and the liability of the merchant in such a case, if the Captain had found it necessary at Batavia to undertake to pay an increased rate of freight. His lord-

ship came to the conclusion, and expressed it clearly, that in such cases the master is bound to do the best he can upon a view of all the circumstances for the interest of all concerned, and that in assuming the responsibility he places himself from necessity in the position of an agent for both parties, the owner and the shipper. "It may be greatly for the benefit of the freighter," he says, "that the goods should be forwarded to their destination, even at an increased rate of freight, and if so it will be the duty of the master or his agent to do so. *In such a case* the freighter will be bound by the act of his agent, and of course be liable for the increased freight."

So far as this case can be treated as authority upon a point which was not directly before the court for judgment, it is clear in support of this claim, and we need not hesitate to rely upon it when it is perfectly in accordance with what has been held in other commercial countries, as in France and in the United States of America.—3 Kent's Com. 212-213; *Mumford v. The Commercial Insurance Co.*, 5 Johnson 262; *Arnould on Ins.* 185 to 189, and page 960.

Surely nothing can be more just. The defendants in this case, when they undertook to carry the goods, expressly excepted the perils of the navigation. Their ship was wrecked and totally lost, and, as the jury found, by no fault of the master or crew: the voyage was at an end, and the defendants relieved from their contract, and if the plaintiff's goods were insured he was in a condition to recover their value, if they had been left to perish or sink; so I assume he could recover against the insurers for the damage occasioned to him by the casualty: that is, for the extra charge in question now that the goods have reached him.

The plaintiff does not complain that the captain did not abandon the cargo and leave him to bear the loss if uninsured, or to recover for a total loss upon his insurance. He makes no objection to receive the goods at Cobourg, but unreasonably insists that the contract to deliver them for the original rate of freight is still in force, as if no such accident had happened as that which has in fact put an end to the



contract and released the defendants, according to the terms of it, from the obligation to carry the goods.

Considering the express saving in the bill of lading of all perils and dangers of the navigation, one does not very well see how the plaintiff could expect to have his goods carried to him at the expense of the defendants from the place where the "Ontario" had been wrecked. He seems to have imagined that as the defendants had received from him the freight that was originally to have been paid, that he was necessarily fully acquitted by that payment, but that certainly is not so. It is laid down as clearly established in English law, in conformity with the uniform tenor of the continental and American authorities, that in cases where the original ship is disabled by the perils of the seas, by any event which the master has not occasioned, and over which he had no control, the master is empowered to procure another ship in which to forward the goods to their place of destination; and on their arrival in such substituted ship, the owner is entitled to receive from the merchant the whole amount of freight which he might have claimed had they arrived on board the original ship—*Arnold on Insurance* I. 185. In receiving the full freight, therefore, the defendants received that to which their right could not be disputed; but they did not limit their claim to that, but insisted upon having also the increased charge which they had incurred in saving the goods for the plaintiff and delivering them to him.

Their right to that increased charge, I think, is as clear as the other. The defendants had a right to withhold the delivery of the goods till they were paid, and I see nothing in the case by which we can hold that they lost their lien; I am of opinion, therefore, that the rule that the plaintiff should be allowed to enter a verdict for the value of the goods detained should be discharged.

McLEAN, J.—It is not necessary to refer to any other plea than the fifth; for if a good defence is made out under that, the present application to enter a verdict for the plaintiff, pursuant to leave reserved at the trial, must necessarily fail. It is not denied that the facts as stated in the fifth plea, if

proved, afford a good defence to the action. The plaintiff alleges that it was of their own wrong, and not for the reasons assigned in that plea, that the goods were not delivered to him at Cobourg according to the contract. Now the evidence clearly establishes that the goods were on board of a steamer of the defendants called the "Ontario," to be carried from Montreal to Cobourg: that in the course of the voyage that steamer was wrecked on lake Ontario, near Nicholson's Island, and rendered wholly incapable of carrying the goods by reason of the stress of weather and the dangers of the navigation.

The contract of the defendants was to carry the goods, unless prevented by dangers or accidents of the navigation; and an accident arising wholly from the dangers of the navigation having destroyed the defendants' vessel in which the goods were embarked, the contract to deliver at Cobourg became impracticable, and was therefore at an end. Had the defendants allowed the goods to remain where their vessel was stranded, could the plaintiff have sustained an action for not delivering them at Cobourg on such a contract as that declared on? It is clear he could not, the dangers and accidents of the navigation being expressly excepted, and the inability to deliver arising, as alleged in the plea, from that cause, and for no other reason whatever. If then the defendants would in law have been justified in leaving the goods to be looked after by the owner after the wreck of their vessel, their duty as carriers must be considered at an end when the wreck occurred, and they could claim freight only as far as they had carried the goods. If the plaintiff hearing of the wreck had himself attended to the saving of his goods, and had taken them from the wreck to their destination at Cobourg, he could not by doing so have relieved himself from the obligation to pay for any advantage which he derived by the defendants' carrying his goods a portion of the distance between Montreal and Cobourg. In that case he would have to pay any additional cost which he might incur in saving them and in transporting them from the wreck, and he could not call upon the defendants to make good to him any portion of the additional cost. But

the defendants very properly, instead of leaving the several owners of goods to look after them when the vessel was wrecked, took measures to secure them, and to forward them with as little delay as practicable to the consignees. The plaintiff's goods were saved, and forwarded at considerable expense to Cobourg, and there placed at the hands of an agent, subject to the payment of the charges upon them by the plaintiff. These charges consisted of the freight earned by the defendants, and the additional cost incurred in saving the goods and having them carried from the wreck to Cobourg. The goods having been carried for the plaintiff from Montreal to Cobourg, there could be no doubt that the defendants were entitled to freight according to the terms of the contract, and as to that amount the plaintiff was willing to pay, and did pay, but as to the charges for saving the goods and employing another vessel to carry them from the wreck near Nicholson's Island the plaintiff refused to pay, and he has brought this action to recover their value on account of their non-delivery. The plaintiff is willing to avail himself of a service which the defendants were not bound to render in saving his goods, and in carrying them from the place where they were wrecked, but he is unwilling to pay his proportion of the expense incurred. But having the advantage of the service he is bound, as it appears to me, to pay for it—Abbott on Shipping, 556; 1 Lord Ray. 393; 8 East 57. Had a stranger rendered such service and incurred such expense he would surely be entitled to demand compensation, and he would be entitled to hold the goods till the costs of salvage and of transport were paid: he would have a lien on the goods for his reasonable reward, and could not be compelled to part with it till paid. From the time of the wreck the defendants cannot be considered as acting under the contract as carriers, but as agents for all the parties who had goods on board of their vessel. The case of *Shipton v. Thornton* (9 Q. B. 314) shews that the master and ship-owner are looked upon in the same light, and whether the transshipment or salvage of goods is by the master or by the ship-owner is immaterial. Lord Denman, speaking of the duty of the master of a vessel which has

been disabled, to transport goods, *even at a higher rate of freight*, in order that they may reach their destination, says, "in such a case the freighter will be bound by the act of his agent, and *of course be liable for the increased freight*, and the rule will be the same whether the transshipment be *made by the ship-owner or the master*. In the same case it is stated "that it may be safely taken to be the *duty or the right* of the ship-owner to tranship," in case of a ship being disabled, &c. If a duty it must be so in virtue of his original "contract;" but if the contract by its terms was at an end when the vessel was wrecked, no duty could afterwards result from it, and if any duty could arise it must be from the master or ship-owner being entrusted with the care of goods, and being in consequence bound to take all reasonable care of them, and to use their best exertions to save them for the owners. Any duty so arising, unconnected with the contract, must necessarily form a distinct subject of consideration between the parties, and must of course be judged of unconnected with the obligations arising out of the contract. If it was a *duty* which the defendants or the master of their vessel were bound to perform, then it is clear that they have performed it for the advantage of the plaintiff as freighter; but inasmuch as it could not arise from a contract which was at an end, the plaintiff has no right to claim his goods under that contract, or on any other grounds, till he has paid the reasonable charges which have been incurred by the defendants in his behalf.

The amount of these charges must of course depend upon circumstances—Abbott on Shipping, 7th Ed. 435. The plaintiff might tender a reasonable sum, and then sue for his goods, if not accepted; but till he has paid or tendered such reasonable sum he has no right to insist on the goods being delivered up to him, on which the plaintiff, or the party who saved them and afterwards carried them to Cobourg, have undoubtedly a lien.

BURNS, J.—The first question for consideration is whether the defendants are entitled to retain the verdict in their favour on the plea of not guilty. If the question turned



upon the fact whether there was carelessness or misconduct in navigating the vessel, then I should say the jury were quite right in their conclusion, and upon the evidence I should myself say there was nothing blameable in the master or crew. The plaintiff's case does not run upon the question whether there was negligence or misconduct in transporting the goods from Montreal to Cobourg, both upon the question whether there was improper conduct on the defendants' part after the goods had arrived at Cobourg. It is true the declaration charges the defendant with not safely or securely carrying or conveying the goods within a reasonable time, or at any time; but it also charges them with not safely or securely delivering them at Cobourg for the plaintiff, although a reasonable time had elapsed; and charges that the defendants so negligently and improperly behaved and conducted themselves in that behalf (which includes the non-delivery as well as not conveying) that by and through their carelessness and improper conduct, the goods became and were wholly lost to the plaintiff. The question is whether that form of declaration would enable the plaintiff to recover, notwithstanding the finding of the jury upon the point of negligence in the management and conduct of the vessel. I am of opinion it would be sufficient. It was proven that the goods did arrive at Cobourg, and under the circumstances of the case within a reasonable time. The defendants' contract was, however, not only to carry the goods to Cobourg, but there to deliver them for the plaintiff. The declaration shews a breach of both parts of the contract; and as to the first part—namely, safely and securely carrying the goods to the port of destination within a reasonable time—the jury have found that the defendant performed that part. The plaintiff was not bound to prove the whole of his declaration, and if he shewed that the defendants failed to deliver the goods according to their contract after their arrival, that would give him a cause of action. In the case it is only to be considered whether the declaration alleging that by not delivering the goods to the plaintiff, and that thereby they were lost to him, is sufficient. I think the case of *Raphael v. Pickford* (5 M. & G. 551) is sufficient authority for hold-

ing the declaration to be sufficient. In that case it was framed as in this case, and at the trial it was proved that the parcel was delivered to the plaintiff, but was so delivered a considerable time after it should have been. It was contended that this declaration should have been framed for not delivering within a reasonable time, and not for the total loss of the parcel, but the Court held the plaintiff might recover upon the declaration so framed. Chief Justice Tindal in giving the judgment said, "It was not denied that, if the action had been brought for the total loss of the parcel, and the evidence had shewn that it had *never* been delivered, the plaintiff would have been entitled to recover upon the declaration as now framed." Now, in the case before us, that is just precisely what the plaintiff proved at the trial; he proved the contract to deliver at Cobourg, and that the goods had arrived there, and that he had demanded them from the defendants' agent and was refused. Then the case presents this question upon the plea of not guilty, whether what the defendant did shew could be given in evidence under that plea. The freight of the goods was paid by the plaintiff, and they were not detained for that cause, but the defendant claimed that expenses were incurred in saving the cargo, the vessel having been totally lost, and that the plaintiff should contribute an average; and they detained the goods until the claim should be satisfied or secured by the plaintiff. The plaintiff refused to do this, and for the cause the goods were not delivered. The defendants could not, I think, set up such claim under the plea of not guilty. The case of *White v. Teal* (12 A. & E. 106) is an authority for that point. As Lord Denman puts it, the plea of not guilty admits the plaintiff's title, and that title consists of the right of property and right of immediate possession at the time of the alleged conviction, but a lien is inconsistent with, and negatives the plaintiff's right of possession. If this case, therefore, rested upon the plea of not guilty, I am of opinion the defendants would fail in their defence.

The next consideration is, whether the defence set up by the fifth plea, and the answer to it *de injuria*, will afford a defence to excuse the defendants from delivering the goods.

That plea alleges that the defendant saved the plaintiff's property, at great expense, from destruction and loss from the dangers and accidents of the navigation, and that the property was afterwards delivered at Cobourg for the plaintiff, subject to such charges as were necessarily incurred, of which the plaintiff had notice. If this claim were made in the shape of salvage on the part of the defendants, I feel quite clear it must be rejected. The master and crew of the vessel (as the defendants' servants) were bound to do all they could to perform the contract to deliver at Cobourg, and to exert themselves to prevent the cargo from being destroyed. There are cases of abandonment, in which some of the crew afterwards save the property, and become entitled to claim salvage from the owners of the vessel. The master of a vessel, however, could not make such claim, and if he cannot, neither can the owners of the vessel. This case, however, does not present itself as one for salvage, because the stranding of the vessel, as proved at the trial was expressly with the hope of recovering the property, and all that was done by the master and the defendants was no more than it was their duty to do. Treating the matter as one for general average, the case presents itself in a different point of view. If the master of the vessel had left the plaintiff's goods (after securing them on shore when the vessel was wrecked) the plaintiff would have been obliged to have done the best he could with them—either sell them there, or procure the means of transporting them elsewhere—and in that case the vessel would have earned no freight. In this case the defendants chose to obtain the means of forwarding the goods to Cobourg, and having done so have entitled themselves to be paid their freight, and that he has been paid. It appears that in this case the vessel was totally lost and the cargo saved. That state of facts presents a very curious question, and one, as it appears, not yet decided in the English courts—whether under such circumstances the owners of the cargo are liable to contribute to the owners of the vessel, in respect of the vessel, as upon a general average. After much consideration in the courts of the United States, it has been adjudged finally that there is no difference between the case

of a partial and that of a total loss of a ship by a voluntary stranding, and that both constitute equally a case of general average—See *Columbian Insurance Company v. Ashby* (13 Peters 331). It is not necessary in this case for us to decide that question. The defendants have not made a claim upon the owner of the cargo for average for the loss of the vessel, so far as disclosed by the plea. The claim they have set up is for the expenses of saving the cargo from destruction from the dangers of the navigation, and that the plaintiff's goods were subject to the charges *necessarily incurred* delivered at Cobourg. Upon the subject of average generally, in a case in which the claim was charged by the owner of the vessel against the owner of the cargo, and paid in Russia, the plaintiff bringing an action to recover it back, Lord Tenterden said, that the obligation to contribute depends not so much upon the terms of any particular instrument, as upon a general rule of maritime law." There are, however," he says, "many variations in the laws and usages of different nations, as to the losses that are considered to fall within this principle. But in one point all agree, namely, the place at which the average shall be adjusted, which is the place of the ship's destination or delivery of her cargo. I believe also that all are agreed on another point, namely, that the master is not compellable to part with the possession of goods until the sum contributable in respect of them shall be either paid or secured to his satisfaction." The defendants, it appears, were put to expense in procuring other vessels to proceed to the wreck, in order to take off and secure the goods. The goods being at the risk of dangers of the navigation, it would not form part of the duty of the defendants to procure vessels to proceed to the wreck for that purpose *at their own expense*. According to the decisions in the United States courts and the law of France, it appears that the ship-owner is entitled to charge the cargo with an increased freight, if such be paid to procure the delivery of the goods at the port of destination, and, as a consequence, it becomes an average loss. In *Shipton v. Thornton* (9 A. & E. 314) Lord Denman, in giving the judgment of the court says, "No case of the court that we are aware of



had occurred in this country; nor is it necessary for us to express any opinion further than as it bears on the present question." The question before the court in that case was, whether in case of transhipment on account of unseaworthiness of the vessel, and the freight actually paid to another vessel to carry the goods to the port of destination being less than the freight to be paid to the first vessel, should be the amount to be recovered, or the amount of the original sum agreed to be paid. One way of testing the question was to suppose an increased rate to be paid, then upon whom should the loss fall? Lord Denman says, "it may well be that the master's right to tranship may be limited to those cases in which the voyage may be completed on its original terms as to freight, so as to occasion no further charge to the freighter; and that, where the freight cannot be procured at that rate, another but familiar principle will be introduced, that of agency for the merchant. For it must never be forgotten that the master acts in a double capacity, as agent of the owner as to the ship and freight, and agent of the merchant as to the goods; these interests may sometimes conflict with each other, and from that circumstance may have arisen the difficulty of defining the master's duty under all circumstances in any but very general terms. The case now put supposes an inability to complete the contract on its original terms in another bottom, and therefore the owner's *right* to tranship will be at an end; but still, all circumstances considered, it may be greatly for the benefit of the freighter that the goods should be forwarded to their destination, even at an increased rate of freight; and if so, it will be the duty of the master, as his agent, to do so. *In such a case* the freighter will be bound by the act of his agent, and of course be liable for the increased freight. The rule will be the same whether the transhipment be made by the ship-owner or the master; and in applying it, circumstances make it necessary, on the one hand, to repose a large discretion in the master or owner, while the same circumstances require that the exercise of that large discretion should be very narrowly watched." Now, according to this decision, independent of the question of procuring vessels to

proceed from other ports to the place of the wreck in order to secure the cargo from loss, the increased rate which would have to be paid to have the goods transferred from the place of the wreck to Cobourg would have to be paid by the plaintiff; and in such case these expenses and charges would form a lien upon the goods, and being paid by the defendants as the ship-owners of the vessel with which the original contract was made, entitled them to hold the goods until the plaintiff paid that expense. This point would be on the ground of contract made by the defendants or their master, as agent of the plaintiff, for his benefit, and would be irrespective of the question of average. On the point of average, however it was proved that the defendant procured vessels to proceed to rescue the cargo from the wreck, and if that entitled them to claim those expenses in that light, then for those the defendants had a lien on the goods. In *Plummer v. Wildman* (3 M. & S. 482) the expenses of unloading a ship which had to put back to port in consequence of a collision in order to repair the vessel, was held to be the subject of general average. The expense incurred in this case seemed for the benefit of all concerned in the cargo, and to save it from loss. It appeared that all the other owners of parts of her cargo had joined in a bond to contribute to the expenses of saving it, but the plaintiff refused to join. It seems he was willing to give a letter promising to pay his proportion of those expenses, but upon the letter being furnished to him he did not sign it. The reason why the plaintiff's goods were detained by the defendants was that they claimed a lien upon them for his share of those expenses. He declined ultimately to pay or secure any share of the expenses, contending that having paid the original freight bill, *that* entitled him to have his goods without further charge. He rests his claim upon that proposition. I do not think he can legally resist the defendants' claim to be paid, either for average in saving the cargo, as proved in this case, or for extra freight paid to the other vessels for carrying his goods after transshipment; and as the defendants had a lien on the goods for those charges and expenses, the plaintiff should have shewn a tender of a sufficient amount to compensate

the defendants, if they could not agree upon the sum to be paid, as there had been no adjustment of it before the action was brought. The plaintiff, however, rests his claim upon the simple proposition that the defendants were not entitled to any thing beyond the amount of freight; and in this respect I think he is wrong, and that the defendants are not liable to him as for a total loss of the goods to him in this action.

The verdict should properly stand\* for the defendants on the main point at issue between the parties.

Rule discharged.

### WALKER AND THE MUNICIPALITY OF BURFORD..

*Survey*—12 Vic., ch. 81. sec. 31—18 Vic., ch. 83, sec. 8—*Levying rate*.

The statute 12 Vic., ch. 35, sec. 31, provides for a survey of *concession lines* being made, on application to the Governor by the municipal council, which application need not be at the request of the landholders. The 18th Vic., ch. 83, sec. 8, provides for making a survey, and placing monuments to *mark the front and rear angels of lots*, on application to the Governor by the municipality, made at the request of one-half the resident landholders to be affected.

An application was made under the first act, without any request of the landholders, to mark out concession lines, and under it the survey provided for in the second act was afterwards made, to *define the boundaries of lots*: *Held*, that such survey was illegal.

The rate to pay for a survey, made under these acts, must be levied not upon the assessed value of the land, but in proportion to the quantity held by the respective proprietors.

*J. Duggan* moved last term to quash by-law No. 61 of the township of Burford, passed on the 13th September, 1856.

1st. Because the inhabitants of the 13th and 14th concessions of Burford made no application to the municipality, such as the statute 18 Vic., ch. 83, sec. 8, required in such a case.

2nd. Because no application was made by the municipality to the government according to the statute, as stated in the by-law.

3rd. Because monuments have not been placed at the front and rear angels of the lots in the two concessions, as stated in the by-law.

4th. Because the sums levied to pay the expenses were not raised according to the statute: that is, not on the pro-

prietors of land in *proportion to their respective quantities of land* in the two concessions, but on the assessed value of the land, thereby subjecting the persons assessed to a rate on the value of their buildings and improvements, and not on their land alone.

The by-law recited that there had been disputes about the boundaries of the 13th and 14th concessions of Burford; that with a view to settle them the municipal council had applied to the government, under the statutes 12 Vic., ch. 35, sec. 31, & 18 Vic., ch. 83, to have a survey made, and monuments placed and marked: that the survey had been made, and boundaries established: that the municipal council had caused an estimate to be made of the expense incurred, in order that the same might be levied on the proprietors *in proportion* to the quantity of land held by them respectively in the said concessions, and had ascertained it to amount to £62 10s.; and then the by-law enacted, that there should be raised, levied, &c., “*from the proprietors of land in the said 13th and 14th concessions of Burford, in proportion to the quantity of land held by them in the said concessions, in the same manner as any sum required for any other purpose authorised by law may be levied, such a rate or sum of money (in addition to all other taxes rated on said property for the current year) as in the whole shall be equal to and defray the expense of such survey, and the establishment of such boundaries, amounting as aforesaid to £62 10s.*” And in the next clause it was enacted that the £62 10s. should be *raised by means of a special rate of three-seventh of a penny in the pound on the assessed value of the lands in the said 13th and 14th concessions of Burford.*

It was sworn in affidavits filed by the applicant, who owned land in the 13th concession of Burford, that this by-law was then in full force and unrepealed; that he was informed by the township clerk that there was no record in the minutes of any application having been made to the Governor-General by the municipal council, as recited in the by-law: that in November, 1856, he searched for the monuments and boundaries which the by-law stated to have been planted, “*and could find no such monuments,*” and from



information he had received from other persons in a position to know, he believed that none such had ever yet been planted. In answer affidavits were filed, shewing that the municipal council did pass a resolution on the 9th of October, 1852, for petitioning the Governor-General to "appoint Mr. Willam Wonham to *servey the 13th and 14th concession lines, as also the West Town line*: that Wonham was in consequence duly appointed to make the survey, and finished it in *December, 1855*, and reported the same to the municipal council and to the commissoner of crown lands on the 21st of January, 1856; and that in April, 1856, the commissioner of crown lands certified to the municipal council that the survey had been examined and found satisfactory, and make an order that the expences should be paid.

There were also affidavits of two persons who assisted in the survey, and who swore that the survey was made and the monuments planted under the direction of Mr. Wonham.

*M. C. Cameron* shewed cause.

The statutes referred to are noticed in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

It is explained that there was a misapprehension, which led to the statement that no application had been made by the council to the Governor-General. But it does appear that the application which they did make was not preceded by any application from the inhabitants, which it need not have been if it is to be looked upon as an application made under 12 Vic., ch. 35, sec. 31, but which does seem to be necessary in regards to applications made under 18 Vic., ch. 83, sec. 8.

But what appears rather strange is, that this application was made in 1852, long *before that act* was passed, and required only the concession lines to be surveyed and marked as provided for by 12 Vic., ch. 35; but under it a survey has been made since the passing of 18 Vic., ch. 83, and monuments planted (if any were) to mark *the boundaries of lots*; as if it were upon an application made under that act, and not under 12 Vic., ch. 35, that the work was done.

We do not think this by-law can be sustained; for, first,

the by-law recites, that an application was made under the statutes 12 Vic., ch. 35, and 18 Vic., ch. 83, to have the concessions surveyed, and monuments placed *according to the acts*.

Now the Municipal council made only the one application which was in October, 1852, and that could not possibly have been made under the authority of 18 Vic. (1855). So far as regards the placing monuments to mark *the angles of lots in these concessions*, the application did not ask for it, and could not legally have done so, at least not so as to make the proprietors liable for the expense if the lots have been marked by monuments, which we infer from the by-law.

And if the application could have been made under 18 Vic. it would clearly have required, by the terms of that act, to be preceded by a request from one half the resident land-holders.

In fact an application legally made to the government for one purpose, and under one of the statutes, has been improperly made use of and acted upon, as if it had been made for *another purpose* and at a later time, under another statute.

It is only the latter statute which could have authorised it at all, and the provisions of that act have not been followed and could not have been, because then (in October, 1852) there was no such act.

2nd. There can be no doubt that under either act it is only stone or other durable monuments that should be planted. We need not act upon that ground, however, as the other ground is clear; but it is true that while the applicant swears he can find no monuments, it is only stated in answer that monuments were placed, without saying of what kind. This is unsatisfactory.

3rd. Then as to the levying the rate; the 31st section of 12 Vic., ch. 35, requires that the survey shall be certified by the Commissioner of Crown Lands; but the commissioner has only certified to such a survey as the resolution called for, namely, surveying and marking the *concession lines*, not the marking of front angles of lots; and the by-law speaks of a survey made under *both the acts*, which, if it means any thing,

must mean that the angles of the lots were marked by permanent monuments; and if so, then the by-law authorised money to be raised for paying the expense of that operation. Whether the lots were in fact marked by boundaries is nowhere stated. In that respect the case is obscure. I only infer it from the recital in the by-law of the statute of 18 Vic., ch. 83.

The objection mainly relied upon against the manner of levying the rate is, that it makes the proprietors liable, not in respect of the quantity of land owned by them in either of the concessions, but according to the assessed value of such land, which would include buildings.

The council answer that they have followed the statute, and so they have literally (that is, the 12 Vic., ch. 35, sec. 31) in one respect and to a certain extent, in providing "that the amount shall be levied on the proprietors in proportion to the quantity of land held by them respectively in the said concessions, and in the same manner as any sum required for any other purposes authorised by law may be levied." But they provide in another clause for levying a rate of 3-7ths of a penny in the pound *upon the assessed value of the land in the said 13th and 14th concessions.*

The 30th and 31st clauses seem rather inconsistent as regards this point, unless we take "*in the same manner*" in the 30th clause, to mean only as to the process of collecting, and not the principle of imposing the rate; and I think we must so interpret it to avoid the repugnancy.

And at any rate the statute clearly says that the sum to be levied on the proprietors is to be in proportion to the *quantity* of land held by them respectively, and this is departed from in the manner of levying this rate.

It is sworn that part of this concession forms a village, in which valuable houses are built on small lots, and the effect of a rate on the *assessed value of the land*, if it includes buildings, as I suppose it must, would be to make the proprietor of one-fourth of an acre with a house on it pay more perhaps than the owner of 100 acres. If that would be fair, still it is not making them contribute according to their respective quantities of land.

We see difficulties in the way of such an assessment as the statute seems to require, but we cannot help that.

We are of opinion that the rule for quashing the by-law must be made absolute, with costs.

Rule absolute.

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IN RE TIERNAN AND THE MUNICIPALITY OF NEPEAN.

*School Trustees—Cost of defence—Rate—Separate schools.*

A rate may be levied to reimburse school trustees for the costs of defending a groundless action brought against them.

Where such charge was incurred before the establishment of a separate Roman Catholic school: *Held*, that the supporters of that school were not exempt from the rate.

*Fellowes*, Q. C., obtained a rule on the Municipality of Nepean to shew cause why their by-law No. 74, passed on the 23rd of October, 1856, should not be quashed.

First—Because the assessment, or amount directed by it to be levied, is not legal, not being authorised by any statute.

Second—Because part, viz., £45, of the amount authorised to be levied, is for paying certain costs of defence of an action brought by one Ann Tiernan against the trustees of common school section No. 13, in which the defence failed; and it is not shewn by the by-law that the school trustees endeavoured to obtain the amount from Ann Tiernan.

Third—Because this £45 was not expended or to be expended for any purpose for which the school trustees are authorised by law to levy money, but was levied in order to pay costs for which the trustees were liable to the attorney they employed.

Fourth—Because it is not shewn that the by-law was passed with the assent of a majority of the freeholders or householders in the school section, as required by-law.

Fifth—Because it is not shewn that the by-law was passed at the request of the trustees under that part of the 13 & 14 Vic., ch. 48, which enables them to levy an additional rate to pay teacher's salary, and other expenses of the common schools, &c.

Sixth—Because the by-law authorises £75, which includes



the above £45, to be levied on the subscribers to or members of the Roman Catholic separate school established in section 13, which is contrary to law, and especially to the statute 18 Vic., ch. 131, sec. 12.

Ann Tiernan, in 1854, brought an action in this court against the school trustees of this section, to recover from them an arrear of wages which she claimed to be due to her as a school teacher.

At the trial she obtained a verdict, notwithstanding the defence pleaded, that by the statute 13 & 14 Vic., ch. 48. and 16 Vic., ch. 185, sec. 15, there could be no action sustained in a court of law upon such a claim the party being confined to the remedy given by those acts.

The verdict was moved against as being contrary to law, and a new trial was granted without costs, in Michaelmas Term, 1856. (a)

No attempt was made by Ann Tiernan to proceed further in the action, as it was clear she could not recover; and the defendants, the school trustees, being satisfied that they would not be able to obtain any costs from her, thought it useless to increase them by forcing the case again to trial.

They applied in a formal manner under their corporate seal to the municipality of Nepean, to levy a rate in order to reimburse them in their costs, and on that application this by-law was passed.

*Richards* shewed cause. *Nanton* supported the rule.

ROBINSON, C. J.—The questions are first, whether the amount of these costs could legally be levied under the school acts; secondly, whether the by-law could legally direct the money to be levied on all the rate-payers.

The Roman Catholics had a separate school established there in August 1855, and they claim to be in consequence exempt under the statute from contributing to any rate of this kind for general school purposes.

The municipality, on the other hand, considered that as the action was brought in 1854, and was pending in 1855, when

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(a) *Tiernan v. School of Nepean*, 14 U. C. R. 15.

the Roman Catholics obtained their separate school, it was their duty to make this a charge upon them as well as other rate payers.

Upon the first point, whether the costs of the trustees in defending themselves against the action of Ann Tiernan could properly be reimbursed by a rate levied for that purpose, I think it could, for that it comes fairly under the terms "expenses of the school" and "for common school purposes," used in the school act 13 & 14 Vic., ch. 48. Law expenses however unavoidably incurred by the trustees in execution of their trust, do not seem to be specially provided for in any of the acts; but considering the burdensome duties thrown upon the trustees, and the importance of there being faithfully discharged, it can never have been intended by the legislature to leave them to bear out of their own means the charge of defending themselves against actions brought against them without good ground, for any alleged cause of action connected with their conduct in their office.

They are not by law liable to any action by a teacher for his wages, for the act of parliament protects them, but all they could do was to set up that protection when the action was improperly brought, and they did so and with success. The cost they were put to, it seems to me, may reasonably be classed as an expense attending that part of the common school system with which they were charged, as much as if a groundless action were brought against them upon some contract of theirs for building or repairing a school-house, which they had faithfully observed. As to the trustees being left to obtain payment of their costs from the party who had sued them, we must presume, till the contrary is shewn, that the trustees have done nothing wrong in that respect. It is sworn that Ann Tiernan is not in circumstances to pay, and at any rate, we could not hold that they were under any legal necessity to wait upon their chance of obtaining the costs from her.

Then the remaining objection is as to the rate being general, that is, upon all the rate payers, without giving to the Roman Catholic inhabitants who support a separate school the benefit of the exemption which the statute 18 Vic., ch. 131, sec. 12, secures to them.

We think that exemption does not extend to rates necessary to be levied for meeting charges incurred before the separate school was established.

In framing a system so complicated as that established by the Common School Acts, it is impossible to foresee and provide for all possible circumstances. The statutes are not explicit on this particular point of indemnifying the school trustees (as trustees in other cases are indemnified) against legal charges thrown upon them in the discharge of their duty, where they had not exposed themselves to such charges by any misconduct on their part, but we think it comes fairly under the general provision respecting expenses.

In the case of *Stark v. Montague et. al.* (14 U. C. R. 473) we had this general question before us, and we then took the same view of this question. There is no ground, we think, for any of the other objections taken.

BURNS, J.—It appears to me the rule for quashing the by-law should be discharged. At present I think the trustees had power to assess, or call upon the municipal council to assess, the school division for the costs they are put to in defending a suit unjustly brought against them. If the trustees were obliged to advance the necessary funds to carry on the defence out of their own pockets, and trust to be reimbursed by process of law against the person who brought such a suit, I am afraid few would be willing to accept a trust which imposed such a liability. The trustees are a corporation, and in this instance were sued as such, and there is nothing improper in there being, I mean as a corporation, placed in funds to meet the demands which the defence of a lawsuit rendered necessary. Corporations cannot, any more than individuals, carry on the defence of lawsuits without the means to do so; and it cannot be expected that the individual members who compose the governing body of the corporation are to pay in the first instance from their own means, and trust to chance or a new set of trustees to provide the means to reimburse them at a subsequent period. There can be no question that it was legal for the governing body to provide the means of discharging their liability, without waiting to see if the costs could be made from *Ann Tiernan*.

The chief ground of complaint is, that the complainant and others set themselves off as a separate school, being Roman Catholics, and therefore that they should not be assessed to pay these expenses. They, it appears, did give notice to the Reeve, under the 4th section of 18 Vic., chap. 131, but the suit, the expenses of the defence of which the by-law is to provide for, was commenced before their separation. The 12th section of the same act provides that whoever shall belong to a separate school, and a supporter of it, shall be exempted from the payment of all rates imposed for the support of common schools, and of common school libraries, for the year next following after the first of February in any year, provided they give notice before the first of February to the clerk of the municipality. Two things are provided for, and nothing more, that they shall be exempted from contributing to, and even those only upon giving notice that they belong to and support a separate school. I incline to think they would not, even if they gave notice to the clerk of the municipality of their supporting a separate school, be exempted from the payment of their share of the expenses of the defence of a lawsuit incurred before the separation, but in this case it does not appear that the relator has taken the necessary steps to prevent his being rated the same as other proprietors or tenants. It appears to be absolutely necessary that he should shew he is a supporter of a separate school, for a separate school may have been asked for, and yet the person may not be a supporter of it. I do not mean to say, if that had been shewn, that the applicant would in this case have been excused contributing to the expenses, but I take it that shewing he is a supporter of a separate school, and that he notified the clerk of the fact, are preliminary steps to asking that the by-law shall be quashed.

The rule should, I think, be discharged with costs.

McLEAN, J., concurred.

Rule discharged.

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CARSCALLEN V. MOODIE (SHERIFF) AND DAFOE  
(DEPUTY SHERIFF).

*Bill of sale—Execution—Time allowed for filing—Priority—Change of possession—Land and chattels assigned together—12 Vic., ch. 74, 13 & 14 Vic., ch. 62.*

An execution coming in before the filing of an assignment which requires to be filed, is entitled to prevail, though a reasonable time for filing may not have elapsed since the execution of the assignment.

Where the land and buildings on which chattels are, are conveyed by the same deed as the chattels, the assignee, though held to be in possession of the land by virtue of his deed, is not to be looked upon as having taken possession of the chattels also, so as to dispense with filing the assignment; he must either actually take possession of the buildings, or the assignor must go out.

C. owning a mill, with the machinery in it, assigned the whole property, both real and personal, including the lumber, stock in trade, &c., on the premises, to the plaintiff, in trust for himself and other creditors. The deed was registered in the registry office on the day of execution, *but was not filed in the county court, when on the day after its execution, the sheriff seized the machinery, &c., under a fi. fa. against goods, nor was it afterwards filed.* The assignor did not leave the mill, but continued to work it with his men for the benefit of the assignee.

*Held* 1. That there was not such an actual and continued change of possession as to dispense with filing the assignment, and

2. That for want of such filing the *fi. fa.* must prevail.

TRESPASS *quare clausum fregit*, and seizing goods and chattels of the plaintiff, and converting them, &c., and tearing down and removing and converting fixtures.

*Pleas.*—1. Not guilty.

2. As to taking the goods, that they were not the plaintiff's goods.

3. That the *fixtures*, goods and chattels, &c., were not the fixtures, goods and chattels of the plaintiff.

4. That the close and building mentioned in the declaration were not the property of the plaintiff.

5. Justification under a *fi. fa.* against the goods of one Cadwell, at the suit of R. & R. S. Patterson, upon a judgment in the Common Pleas, and entering upon the close and in the building to seize goods of Cadwell, which were then there.

The plaintiff took issue on the first four pleas, and replied *de injuria* to the fifth plea.

At the trial, at Belleville, before *Robinson, C. J.*, it appeared that one Cadwell, having become involved in debt, on the 30th of October, 1855, made an assignment by deed of certain real estate in and near Belleville, to the plaintiff

Carscallen and one Hancock, reciting that it was for the purpose of securing his debt to them of £800, and for the benefit of his other creditors, whose names, with the debts due to them, were mentioned in a schedule annexed to the deed.

And by the same deed he assigned to Carscallen and Hancock all the goods and chattels, stock in trade, plank-road stock, and steam-boat stock set forth in another schedule attached to the deed. The whole was assigned upon trust to be sold, and the proceeds applied, first, in reimbursing all expenses attending the trust; next to paying to Carscallen and Hancock the debt of £800 due to them in full, and to divide the residue rateable among the creditors mentioned in the schedule, "who may think proper to avail themselves of the same," any surplus to be paid over to the assignor.

On the 4th of January, 1856, Hancock released to the plaintiff Carscallen all his interest under the assignment.

The debts in the schedule exceeded in all £4000, one of them to H. Bull & Co. being set down at £2,400, and in the schedule Messrs. Patterson were set down as creditors to the amount of £150.

In the other schedule of goods and chattels assigned, among other things, were set down one planing machine, one small ditto, one shingle machine, one rip-saw and frame, one tenoning machine, three circular saws, one circular wood-saw, one sticker, one boring machine, and a turning lathe.

Cadwell had been the owner in fee of land included in this assignment, on which a large building was erected that had been put up as a steam grist-mill. The assignment was drawn up in proper form by an attorney, who proved its execution, and that it was correctly dated.

It was registered in the *county register* (on account of the lands which were conveyed by it) on the 30th of October, at forty-five minutes past one o'clock, p. m., but it never had been filed with the county clerk under the statutes 12 Vic., ch. 74, and 13 & 14 Vic., ch. 62.

On the 31st of October, the next day after the assignment,

a *fi. fa.* against Cadwell, at the suit of Messrs. Patterson, came at seven o'clock, a. m., to the sheriff, and at nine o'clock the next day the deputy-sheriff went to the premises occupied by Cadwell to execute it. It was proved that this execution was upon a judgment obtained on a verdict given against Cadwell at the assizes, which opened on the very day the assignment was executed.

Under the *fi. fa.* the sheriff seized lumber and other loose property in and about the mill, which property had belonged to Cadwell, but was included in the assignment to Carscallen: he seized also the machines of various kinds which were put up and in use in the mill, treating them as chattels.

The property thus seized was claimed by Carscallen under the assignment, but the sheriff went on and sold; and this action was brought in consequence. The action of Messrs. Patterson against Cadwell, which stood for trial at the assizes at the time this assignment was executed, was brought upon an account, which Cadwell contested, and chiefly on account of a shingle machine which the Pattersons had sold him, and which formed an item of the account, Cadwell contending that it turned out to be a useless machine, good for nothing, owing to its being made on an erroneous principle. The Pattersons on the contrary, who were machinists in large business, affirmed that the shingle machine had been made after a plan for which one Avis had obtained a patent: that they were making one for the patentee, when Cadwell seeing it in hand, and approving of the principle, ordered one to be made for himself like it. If therefore it turned out to be ill constructed in principle, the Pattersons contended that they were not responsible, having merely made it upon Cadwell's own order given by him in reliance upon his own judgment.

There was a good deal in the evidence to shew that Cadwell was determined, if he could, to defeat the Messrs. Pattersons in their attempt to recover, and to bring them and Bull his largest creditors, to his own terms by putting his property out of his hands. He was proved to have said to one of the persons in his employment that though the Pattersons had beaten him in the action, "he would beat

them on their execution ;" and altogether there was much in Cadwell's conduct to shew that his chief object was to defeat the Messrs. Pattersons' execution.

On the other hand, there seemed no reason to doubt that Cadwell was indebted to Carscallen and Hancock, and that they were liable as endorsers upon his notes which the banks had discounted to a large amount. The exact amount of debt or of liability as endorsers was not made out clearly, but it was proved that there were judgments and executions against Carscallen as endorser of the notes.

The learned Chief Justice left it to the jury to determine upon the *bona fides* of the assignment, telling them that there seemed to be no room for doubt that when Cadwell made the assignment he did owe Carscallen and Hancock, and probably as much as the £800 named, including what they were liable for but had not yet paid on the notes : that Cadwell was at liberty, at any time before an execution came into the sheriff's hands, to assign his goods to Carscallen in payment of his debt, or to secure it ; and that if he really desired to do that, and to leave his other creditors (including the Messrs. Patterson) to recover such dividend as his property would produce when rateably divided among them, there was nothing illegal or improper in such a course, though it might prejudice the Messrs. Patterson, whose action was then pending.

He told them also, that as regarded Carscallen there was nothing wrong in his desiring to get his debt paid or secured in preference to others, so far as the law would allow, but that if that were not really the purpose for which he took the assignment, and if he were fraudulently colluding with Cadwell to defeat Patterson's execution, upon any secret understanding between them that the assignment was not to be acted upon in good faith according to its provisions, but was merely a contrivance to cover the goods for Cadwell's benefit, then they ought to give their verdict for the defendants, because in such case the assignment was made for a purpose which the law does not allow, and should be treated as fraudulent and void. He told the jury further, that if they did not come to the conclusion that the assignment was made upon such a fraudulent understanding as he had



mentioned, but that, so far at least as Carscallen knew or intended, it was a real *bona fide* transaction, then there were several things further to be considered in the case.

1st. Under the facts proved, could it be said that the assignment to Carscallen was accompanied by an immediate delivery of the chattels assigned, and was it followed by an actual and continued change of possession of the things assigned ?

2nd. If this could not be found to be the case, then was not the assignment void under the chattel mortgage acts ?

3rd. If the execution was entitled to prevail over the assignment on account of the non-registry of the latter, still it was to be considered whether some of the things seized were not affixed to the freehold, in such a manner that they could not legally be seized under a *fi. fa.* against goods ; for if so, the defendants' justification as to such part of the goods would fail.

The jury found for the plaintiff £250 damages.

*M. Vankoughnet* obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection. He cited *Steward v. Lombe*, 1 B. & B. 506 ; *Taylor v. Whittemore*, 10 U. C. R. 440 ; *Hellawell v. Eastwood*, 6 Ex. 295 ; *Trappes v. Harter*, 2 Cr. & M. 153 ; *Boydell v. McMichael*, Ib. 182 ; *Fisher v. Dixon*, 12 Cl. & Fin. 312.

*Henderson* shewed cause, and cited *Richardson v. Ranney*, 2 C. P. 460 ; *Ackland v. Paynter*, 8 price 95 ; *Winn v. Ingilby*, 5 B. & Al. 625 ; *Place v. Fagg*, 4 M. & R. 277 ; *Oates v. Cameron*, 7 U. C. R. 228.

ROBINSON, C. J.—I have no doubt the jury meant to determine by their verdict that the assignment was made honestly and on good faith as between Cadwell and the assignees, whatever might have been the ruling motive in Cadwell's mind in connection with the claim which the Messrs. Patterson were urging against him. The amount of the verdict leaves no doubt, I think, that they did not confine the damages to such of the articles only as it was contended were fixed in the freehold, and so at any rate not subject to seizure under the writ.

We are first to consider whether on the facts proved the assignment was void under the statute, for want of being registered with the county clerk.

The assignment was made on the 30th of October, at what time of the day did not appear. It was registered with the county registrar on the same day at forty-five minutes past one, p.m. That would take some time, and it is not at all improbable that without any delay on the part of the assignees there was not time after the registry was completed to have the necessary entry made with the county clerk before the closing of his office on that day. The next morning at an early hour the *fi. fa.* came—one witness said about seven in the morning. Twenty-four hours had not elapsed since the execution of the assignment. The 12 Vic., ch. 74, does not allow any time for registry, nor does it require that the assignment shall be registered immediately and forthwith. In some cases where no time is limited for doing an act it is held to be done with sufficient promptness if done within twenty-four hours. If this had been entered with the county clerk on the 31st of October, there might have been some ground for contending (though I do not say that we could have so determined) that the assignment having been registered with all reasonable expedition, it should be looked upon as having been immediately filed, so as to prevent any objection from applying for want of registry.

But the fact is that the assignment has never yet been registered, and I do not see that we can possibly deny that it must on that ground be void under the express words of the statute, unless, which gives rise to another question, the facts were such as make it right to hold that possession did accompany and follow the assignment. As to that, it was proved that after Cadwell executed the assignment on the 30th of October, 1855, he continued for three or four weeks in the mill, and the persons employed under him worked the mill under his directions as before; but he swore that that was done not on his own account, but at the request and for the benefit of the assignees, who paid the men employed. After he had been there for three or four weeks, as he said, on this footing, he left the province.

If the assignment should be held void under the chattel mortgage acts as respects the goods, on account of non-registry, it should perhaps be held void as well in regard to the lands, for the fraudulent design would affect the one as well as the other.

But if under the deed the title to the mill passed to the assignees (which was not made a question on the trial, because the *fi. fa.* was not against lands) then it appeared to me it could not be held that there was not a change of possession of the engines and machinery in the mill; for if the mill was the property of the assignees the possession would also be in them, if it were true that Cadwell was only in under them and superintending for them; for it could hardly be contended, that in order to prevent the operation of the chattel mortgage acts, it would be necessary under such circumstances for the assignees of the mill in which the chattels were being used to disengage them and remove them to other premises merely because Cadwell was employed by them in the mill.

If the jury were right in upholding the assignment as honest and *bona fide*, and if it was not void under the circumstances on account of non-registry, then the plaintiff was entitled to recover the value of all that was sold. If they had found the assignment void for fraud, or if it should be held void for non-registry, then the questions would come up—1st. Whether the plaintiff should nevertheless recover damages against the sheriff for the value of any fixtures, as not being subject to the writ; and if so, 2nd, then what articles if any were fixtures.

A good deal of time was taken up at the trial in investigating and discussing matters which might or might not be material, according to the conclusions which the jury came to in regard to the honesty of the assignment.

That question had first to be disposed of, because it necessarily affected all the property. The jury upheld the bill of sale: that is, they found that it was made in good faith, for the purpose of saving Carscallen and Hancock and the other creditors of Cadwell, and without any secret understanding between him and the assignees that it was only

to be used for the purpose of protecting the property for Cadwell's benefit. The first question is whether that verdict was warranted by the evidence.

The jury had no reason, I think, to doubt that Cadwell was at the time indebted to Carscallen and Hancock, not jointly, but upon several accounts, in some sum of money, though there was a want of certainty in that respect, both as to the amount of the debt due to either, and on what account.

The occasion for their being secured was rather that they had each rendered himself liable for Cadwell for a considerable amount by endorsing for him, which they would have to pay if Cadwell's circumstances became involved, which seemed likely. If, as was alleged, they were liable in this way for about £800, which I did not doubt at the trial, then it was reasonable that they should look for security, and that Cadwell should feel it right to give it. There did not appear to be a want of good consideration to support the assignment, and I told the jury that Cadwell could legally make the arrangement which he did at any time before an execution against his goods came to the sheriff's hands, provided he actually made it with intent to divest himself of the property, and did not merely falsely pretend to do it, and provided also that what the legislature requires to be done on such occasions was complied with.

It was evident that Cadwell was bent upon defeating the claim of the Messrs. Patterson upon him. The period at which he made the assignment, just as their action against him was coming on for trial at the assizes, and his conduct and language throughout, as proved by the witnesses, and not by those on the side of the plaintiff only, proved that very clearly : still his having that motive in his own mind for giving a preference to Carscallen and his other creditors, would not make it less lawful for them to profit by his willingness to give them the preference ; not even, as I think, if they were aware of it.

But such an arrangement was one that should be looked at with caution, for it often happens that when assignments are made in that spirit, they are only colourable and pretended, and not made with the intention of passing the



property to the assignees, and if the assignees in this case shewed by their conduct that they were not acting in good faith, for their own security, but were lending themselves to a mere deceitful contrivance of Cadwell to baffle an expected execution, then there could be no doubt that the assignment should be held to be invalid.

There was perhaps some reason afforded in the evidence for suspecting this, but there did not seem to me to be any clear ground for coming to a conclusion that Carscallen was dishonestly colluding with Cadwell. If a longer time had elapsed after the assignment before the sheriff came to seize, a better opinion might have been formed from the conduct of Carscallen (the remaining assignee) in the meantime, as to whether he had been in earnest in taking the assignment. But the execution followed so closely upon the assignment that a conclusion could hardly be formed upon that point, in consequence of any thing done or omitted by Carscallen, at least not a very satisfactory conclusion.

If we assume that the jury were justified by the evidence in treating the assignment as made in good faith, then the next question is, were the circumstances not such as regarded the possession of the goods assigned, that the assignment required to be registered under the statute. That seemed to me at the trial to be a question of some difficulty, owing to the peculiarity in the case that the premises on or about which the chattels were, were conveyed to the assignees in the same instrument. Any one in possession of the building would be as a consequence in possession of the personal property, and it would seem unreasonable to hold that the assignees, if they had become the owners of the building, must remove the chattels out of it, and take them into their possession in some other place. But there was this to be considered, that although the assignees had taken a conveyance of the real estate and had registered their deed, and although, as a general principle, the owner of real property is looked upon as being continually in possession so long as there is no one holding against him, yet this case has to be considered in connection with the statutes 12 Vic., ch. 74, and 13 and 14 Vic., ch. 62 (the chattel mortgage acts). I have thought a good

deal of this matter since, and it appears to me that Carscallen having taken a conveyance of the building in which the chattels were, and the same instrument containing also an assignment of the chattels, he ought either to have gone into actual, visible possession of the building—that is, by himself, his tenants, servants or agents—or at least Cadwell, who made the assignment, should have quitted the possession and gone out, for otherwise everything, so far as others could see, would continue just as it was, and that deceptive appearance would be held out to the world which it was the intention of the statute to prevent. Cadwell continued working in the factory up to the moment of the sheriff coming, and as he even remained three weeks after the seizure, there is no reason to suppose that he had any intention of quitting the possession when he made the assignment.

He and the men he had employed continued to work the different machines as before, and Carscallen's interest or right to interfere in the business was unknown to the men who were doing the work, and we may assume quite as little known to any body else but Cadwell himself.

If the including the building in the assignment would in such a case prevent the application of the chattel mortgage acts, on the principle I have spoken of, then nothing would be more easy than to evade the law in many cases by taking that course. The former proprietor of the house and goods might still remain in the house using the goods, and could easily set up the usual pretence, that he was there as agent or clerk of the assignees, and holding possession for them. The doubt with me is whether in such cases the judge at *nisi prius* ought not to hold that that is not such '*an actual change of possession*' as must accompany and follow an assignment in order to make it unnecessary to file the assignment with the county clerk, or whether it should in all cases be left as a question of fact for the jury, whether looking at all the circumstances proved there was not an actual change of possession.

I rather led the jury to adopt as a fact resulting from the conveyance of the building, that as there was no one according to the evidence holding adversely to Carscallen, he must be looked upon as in possession of the building and of all that

was in it, and that in such cases the chattel mortgage acts could not fairly apply.

It ought at least, I think, to have been left to the jury, to say whether there had been such an actual change of possession as the statutes require, and with a strong expression of opinion that the evidence shewed there had not been.

I am not convinced that had I taken that view which I now take, and had given the case to the jury in that manner, it would be likely to have led to any different result; for there were several cases at the same assizes in which the validity of bills of sale was in question, and I must say that in these cases, as well as in others which have been tried on other occasions in the same county, the juries seemed to be so easily satisfied of the good faith of any arrangement made by any man who saw an execution in the distance, that I have no reason to feel confident that under a different direction the case would have been otherwise disposed of than it was.

Then if registration of the assignment appeared to be necessary in this case, and if the jury should have been told so, the next question is whether the fact that twenty-four hours had not elapsed between the assignment being executed and the execution coming, would have made any difference in the application of the statute. I do not think it would. If an execution comes before the registration of a bill of sale that requires to be registered, we must hold it I think entitled to prevail; and at any rate this assignment has never been registered, which makes an end of all question (supposing that under the circumstances it required to be registered), for there has been ample time to register it since; and though it might seem to be of little use to register it until it was determined whether the execution which came before it was registered would or would not be held entitled to prevail, yet upon reflection that is no reason on which we could hold registration afterwards to be unnecessary, because the express words of the act requires it to be done, and the interests of other parties who might in the meantime be dealing with Cadwell are concerned in the provisions of the statute being carried into effect.

Taking this view of the case I think there should be a new

trial, costs to abide the event, leaving the question of fixtures, which can effect only a part of the cause of action, to be settled upon the evidence that may be given at the next trial, as to which the case of *Hellawell v. Eastwood* (6 Ex. 295) is very important, but is not easy to be reconciled with the decision in *Winn v. Ingilby* (5 B. & Al. 625.) (a).

BURNS, J.—At what time of the day on the 30th of October, 1855, the deed of assignment was executed does not appear. It was registered at the county registry office for lands at forty-five minutes past one o'clock, and there was still time during that day to have taken the deed, or a copy of it, (for the original was not required to be taken) to the office of the county court clerk, and there filed it. The county court clerk's office that day, being in the term of the county court, was required to be kept open until four o'clock in the afternoon. The next day the execution was placed in the sheriff's office, at half-past nine o'clock in the morning. There was still time that day to have filed the deed or a copy of it in the clerk's office, for on that day his office was required to be opened at nine o'clock. At seven o'clock in the morning of the 1st of November the sheriff levied on the property, and up to that time the deed had not been filed in the county clerk's office, nor in fact has any attempt been made to comply with the law in that respect. So far then, if the plaintiff can rely upon the deed of assignment as giving him title, it can only be upon consideration that from the time of the instrument being executed on the 30th of October, up to the time when the goods would be bound by the execution—viz., half-past nine o'clock on the morning of the 31st of October—there was not a sufficiently reasonable time allowed for the deed, or a copy thereof, to be filed in the clerk's office; and that in the construction of the chattel mortgage act, inasmuch as no time is mentioned within which to file the deed of transfer, therefore a reasonable time must be allowed. I can very well imagine cases in which it may be thought a hardship if a creditor having a *bona fide* claim, and a transfer of property made in good faith

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(a) See, as to the question of fixtures, *Wallace v. Jarvis*, 14 U. C. R. 640.



to secure it, not being able by reason of distance from the extreme end of the county from the clerk's office to file it before an execution could be put in the sheriff's hands, or if the property is not in the county where the instrument is executed, and it has to be sent to that county to be filed, occurring, where an argument may be made that a reasonable time should be allowed to the claimant to file the transfer. The statute, however, is strongly expressed, that the instrument shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or conveyance, or a true copy thereof, together with an affidavit, be filed. In the registry act regarding lands it is expressly enacted that the first registered deed will prevail, and the effect of the chattel mortgage act appears to be the same. The question of priority can only arise between creditors or claimants who are or have become such in *good faith*, and therefore as between them the rule of law, *qui prior est in tempore potior est in jure*, seems the only rule which can properly be applied. If we were to qualify that rule in this case by introducing the ingredient that a reasonable time should be allowed from the time of the execution of the instrument to have it filed in the clerk's office, there might be no end to embarrassing questions, and it might also lead to difficulty between the courts and juries as to how far the rule should be extended. The time of day on which the instrument was executed, distance, accidents which might happen, as for instance the blowing up of a steamboat, a collision on the railway, and the many other things which might prevent the filing of the deed, would become the subject of discussion and of judicial decision. By adopting the rigid construction, that until the deed be filed as directed, the person taking it must run the risk of another person having a claim in good faith taking precedence, we are relieved from all difficulty. This imposes no hardship on a creditor, because he may be more vigilant in procuring the deed to be executed in time to enable him to file it, or he may comply with the other provision of the statute, viz., by taking an actual possession, and afterwards holding the property in continued possession. It is better to hold to that construction which is consonant

with the registry act for lands, than to adopt a construction which must inevitably lead to a laxity of conduct in parties, and leave no certain guide to men of business.

The evidence in this case could not lead the mind to the conclusion that there was an actual change of possession of the property, supposing it was goods and chattels, at the time of the execution of the instrument, or at any time before the sheriff made the levy on the morning of the 1st of November. Whatever portion of the property sold which may be fairly said to be attached to the freehold, it may be argued did pass with the conveyance of the freehold, and therefore was in the seizin of the grantee legally upon execution of the instrument. Such of the property, however, as did belong to the freehold of course could not be sold upon execution; but then it may be argued on the part of the defendants that the plaintiff is not in a position to sustain any claim to it, for if the instrument is void as respects the goods and chattels, it may be said to be a void *in toto*. That point does not arise at present. There was property which, without question, was goods and chattels, and there were portions of different kinds of machinery which may be goods and chattels, and as respects which it would be desirable that the jury should find the facts specially, in order that we may determine the point.

The facts proved did not warrant the jury in finding that an actual change of possession took place, with regard to which I refer to what I have said in the case of *McLeod v. Hamilton* (a); and therefore as respects the portion of the property which undoubtedly was goods and chattels, the verdict is wrong, because the plaintiff cannot legally rely upon the deed; and as respects other portions of the property sold we should, I think, have a special finding of the jury.

The verdict should be set aside, and a new trial should be granted.

MCLEAN, J., concurred.

Rule absolute (b).

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(a) Reported post, page 111.

(b) See 20 Vic., ch. 12, which repeals the 12 Vic., ch. 74, and 13 and 14 Vic., ch. 62, and provides that mortgages and assignments of chattels shall be registered *within five days from the execution thereof*.

THE UNION ROAD COMPANY V. TALBOT, LAWRASON, AND  
NILES.

*Action on contract—Smallness of damages—New trial refused.*

T. being the plaintiffs' engineer, made plans and estimates for their road, but when the tenders came in, the lowest being £1,500 above his estimate, he offered to do the work himself for what he had valued it at. The plaintiffs accepted the offer, and he with the two other defendants, they being in fact his sureties, though not so styled in the writing, entered into an agreement under seal with plaintiffs accordingly. T. began the work, and did what at the contract price would come to about £2,690, allowing certain deductions, which the plaintiffs claimed to make for imperfect work. He then abandoned it and left the province, having received from the plaintiffs about £2,925. The plaintiffs contracted with others to finish the road, at about £980 more than they would have had to pay T., and brought an action against the three defendants for breach of the agreement, claiming to recover this £980. The jury gave only £50, and the court refused to grant a new trial on account of the smallness of damages.

The plaintiffs declared upon a sealed agreement of the defendants, to make a certain portion of gravel road by a certain day, and assigned as a breach a total failure to do the work.

The defendants, besides other pleas traversing averments in the declaration, set forth that a new agreement had been come to between the parties, whereby all those parts of the agreement declared upon in regard to which breaches had been assigned were superseded. The plaintiffs replied that the original agreement had not been superseded.

At the trial, at London, before *Draper*, C. J., the jury found a verdict for the plaintiffs and £50 damages.

*J. Wilson*, Q. C., obtained a rule *nisi* for a new trial, without costs, for smallness of damages, the verdict being in that respect contrary to the evidence, or to increase the verdict to such sum as the evidence warrants. He cited *Armytage v. Haley*, 4 Q. B. 917.

*Becher*, Q. C., and *Prince* shewed cause.

The facts of the case are fully stated in the judgment of the court, delivered by

ROBINSON, C. J.—The defendants had contracted to do the work for £6,995 16s. 3d., and to have it completed by September, 1855. In fact defendant Talbot was the contractor, and the other two defendants were his sureties, but they all executed the agreement as contractors.

Talbot began the work, and executed so much of it as came at the contract price to £2,690 12s. 10d., but then he abandoned the work, and had left the whole in an unfinished state, and it was said had gone from the province.

The plaintiffs have in consequence contracted with others to finish the work, for which they will have to pay £5,295 17s. 4½d., and this being added to what Talbot received from them would amount to £7,986 10s. 2½d., or £980 13s. 11½d. beyond the sum for which Talbot and the other defendants engaged to finish the whole. And it was proved that Talbot had actually received £2,924 16s. 6d., being about £254 more than the value of the work done at the prices he had stipulated for, but then in estimating this work the engineer who did so deducted £211 14s. for imperfections in the work.

The learned Chief Justice suggested to the jury, as a reasonable basis for calculating the damage to be given against the defendants, the £980 which the plaintiffs had been compelled to agree to give others, beyond what Talbot had engaged by his contract to do the same for.

The jury, however, upon what principle is not explained, gave no more damages than £50—possibly from a conviction that as Talbot's was much the lowest tender, he had undertaken it for a sum which the plaintiffs had no just reason to expect to get the work done for.

Talbot was at first the plaintiffs' engineer, and laid out the work, and framed the specifications: then when the tenders came in, and the lowest was found to be £1,500 above his estimate, he offered to take the job himself at the sum he had valued it at. The directors accepted his offer, and substituted the board for the engineer in those parts of the contract which would otherwise have subjected the work to his estimates and approval.

The question is, whether in such a case it would be proper to interpose at the instance of the plaintiffs who have the verdict, and grant them a new trial on the ground that the damages are too small.

It is argued, on behalf of the plaintiffs, that this being an action on a contract, the rule against granting a new trial on account of the smallness of the damages given, is not so peremptory as in cases of tort, and that even in cases of tort



there have been instances in which new trials have been granted, because the court thought the damages given were unreasonably small in compensation of the extent of injury proved.

It is contended that at least the jury should have given the sum of £200 and upwards, which Talbot had received beyond the value of the work done by him, according to the prices at which he engaged to do it, for that was a mere advance on account of work to be done, and which he had never afterwards performed.

With respect to this alleged advance, however, it is to be considered, on the other hand, that the computation upon which this proof of alleged advance is founded, proceeds upon the principle of making deductions from the value of the work on account of alleged defects in the manner of doing it. It would seem as if the jury for some reason did not approve of those deductions, for by allowing for the work done according to the contract prices, without deducting any thing for defects, they considered that the plaintiffs were only in advance to Talbot in about £50, when he abandoned the work, and for that they gave their verdict. The defendants have urged that the rule is against granting new trials on account of the smallness of damages, even in actions upon contracts, except where the verdict must clearly have been founded upon some clear grounds of computation, and when the jury has committed a manifest error in calculating the amount, or have rejected some certain portion of the damages which they clearly ought to have allowed.

It is to be considered that this action is in fact against sureties, as the evidence shewed, though no doubt looking at the terms of the deed the defendants are in strictness of law all liable to be treated as original contracting parties, bound themselves to do the work or cause it to be done. But when we are called upon to grant the plaintiffs the indulgence of going before another jury, not on any ground of misdirection, but on a ground which makes the granting or withholding a new trial a matter of discretion, it is a consideration fair to be entertained that the indulgence asked is to the prejudice of sureties.

And it is further to be considered that the facts of this case

are much out of the ordinary course of such transactions. The plaintiffs contracted with their own engineer, at a sum less by £1,500 than any other person had tendered to do the work for : this had the effect of shutting out those competitors for the work who were willing to have done it for a fair remunerating price, and it deprived those who had an interest in the matter of the check which the engineer's supervision and skill would have furnished if he had stood indifferent. The plaintiffs, it is true, satisfied themselves with resolving that they would themselves watch their engineer, whom they had allowed to become a contractor. The result has been not very different from what might have been expected. The engineer, either finding after he had made progress, or knowing it perhaps before, that it was impossible to do the work for the sum he had agreed upon, quitted the work and the country, and has left the plaintiff to settle with his sureties.

If Mr. Talbot, in order to shut out other offers, had made a proposal absurdly low, as for instance to do for £100 what no one could do for £1000, it could hardly have been expected by the plaintiffs that any thing else would happen than what has happened.

If the plaintiffs had limited their claim to the sum which they allege they had paid to Talbot over and above the value of the work he had done according to the contract prices, and the jury had given, as they have done, a verdict for £50 only instead of £250, or about that, which the plaintiffs say they had actually advanced to Talbot beyond the contract price of the work he had done, would it be proper that we should grant a new trial ? The jury, on a view of all circumstances, seem to have made up their minds to compel the defendants to pay to the plaintiffs the excess of the sum which they had advanced to Talbot above what they had thought the *real value of his work*, rather than the excess above what he was to have done it for ; or perhaps they were not satisfied with the grounds on which the plaintiffs claimed to have certain deductions made from the value of the work done, even taken according to the contract prices.

We think it would hardly be consistent with the principles which govern new trials, that we should set aside the verdict

on account of the alleged smallness of damages, upon a claim and under circumstances like the present, if the plaintiffs, limiting their claim to £250, had only been allowed £50 by the jury, as they have been.

But the plaintiffs only speak of the £250 which they have paid in advance, as a fact shewing strictly their claim to a larger verdict. They insist that they have a legal right to look to the defendants for much more than that; for that their actual damage is the difference between what Talbot had contracted to do the work for, and what they shall be obliged to pay to others for completing what he has left undone.

That as a general rule would seem reasonable, though we cannot say that it is a principle which a plaintiff in all such cases has a strict legal right to insist upon. The jury were probably convinced that the plaintiffs had improperly suffered themselves to be drawn into a contract with their own engineer, upon terms which they could not in conscience expect him or any other person to fulfil: that they had no fair ground for believing that the work could ever be done for the price named in the contract, and that they have only in this sense lost the difference between Talbot's contract and what they will now have to pay—that they have been disappointed in the prospect of getting the work done in great part at the expense of Talbot or his sureties.

If the jury had found for the plaintiffs a much larger sum than they have, even to the extent of the £980 claimed by them, it is not probable that the verdict would have been interfered with; and when the sureties run that risk, it is enough to make them careful not to become surety for the performance of impracticable agreements.

We have felt a good deal of doubt and difficulty in this case; for on the one hand it would be very dangerous and inconvenient if parties were allowed upon failure of a contract to claim, as a matter of course to be relieved from the consequences, upon proof that the work had been undertaken at too low a sum, for then there would be no use in making contracts, and there would be much less hesitation in breaking them.

And on the other hand there are circumstances in this case, which we think might justify and properly incline the jury to refuse to look upon the plaintiffs as actually damnified to the extent of the difference claimed, if indeed they have been damnified at all.

We have referred to the learned Chief Justice of the Common Pleas who tried the case: his direction is not complained of, and we think we should not grant the new trial.

Rule discharged.

### MCLEOD V. HAMILTON (SHERIFF).

12 Vic. ch. 74—"Actual and continued change of possession"—Evidence of. Held insufficient.

TROVER. *Pleas*—1. Not guilty. 2. The goods not plaintiff's.

At the trial, at London, before *Draper*, C. J., a verdict was found for defendant.

*Patterson* moved for a new trial on the evidence, and on affidavits, citing *White v. Stevens*, 7 U. C. R. 340; *Taylor v. Whittemore*, 10 U. C. R. 440; *Taylor v. Commercial Bank*, 4 C. P. 447.

*McMichael* shewed cause.

The facts of the case appear in the judgment.

ROBINSON, C. J.—We have considered the evidence and the affidavits. They have left no doubt on my mind that the plaintiff, at the time of his taking the assignment, was honestly a creditor of *Frazer* to a large amount, for goods sold, for money paid, and for debts assumed for him. He had therefore a perfect right to secure himself by taking an assignment of *Frazer's* goods, either absolute or by way of mortgage; and *Frazer* at the time had a right to give him that preference over his other creditors, if he was willing to do so.

But unfortunately for the plaintiff he seems either to have been ignorant of the chattel mortgage acts, or he has not attended to their provisions.

Though he had a right to proceed to secure his debt, it



was necesasry that he should act openly and *bona fide* in doing so, and that he should observe the provisions of the statutes which I allude to. If upon the execution of the assignment he had taken the goods into his own actual possession, he would have been safe. If he did not do so, then he could not be safe without filing the assignment, or a copy of it, with the clerk of the county court. Now he did not file the assignment. It was indispensable therefore that he should satisfy the jury that the assignment to him "was followed by an actual and continued change of possession," for those are the words of the statute 12 Vic., ch. 74.

Here the evidence shews that the plaintiff lived at a distance from London, where Frazer and his goods were: that the goods were never removed from Frazer's store in consequence of the assignment, nor in any manner disturbed, but that Frazer continued in the shop residing there as before, and having the same clerk in his employment.

It is true it is shewn that he had agreed to take Frazer into his pay, and to give a salary to Frazer himself for managing the store on his, the plaintiff's, account; but the public could know nothing of the arrangement between the parties; so far as they could observe there was no change: Frazer's sign remained up over the shop door, and it was proved that in some few instances he had let persons to whom he was indebted have goods out of the shop in payment of his debt to them, which would certainly tend to impress them at least with the conviction that he was still the owner of the goods, though it is probably true, as it is stated in the affidavits, that Frazer was afterwards charged by the plaintiff in account with the value of the goods which he had thus applied to pay his own debts.

Upon the evidence alone we could not be surprised if the jury had a strong impression, that instead of an assignment intended to pass the property, the arrangement was made upon a secret understanding with Frazer, rather to cover his goods from other creditors than for the purpose stated in the assignment.

The affidavits can hardly be said to afford any ground on which we could act as distinct from the evidence given at

the trial, for both the deponents, Charles McLeod and Pridham, were examined upon the trial, and if they did not state then all that they knew the plaintiff should have seen that it was elicited from them. The other affidavit is from the plaintiff himself, who could not be examined as a witness in his own favour, if we should grant a new trial.

It is a strong fact that after the assignment was made groceries and whiskey came to the shop from this plaintiff himself, who had been in the habit of supplying Frazer, and these were addressed to Frazer as if he were still the person carrying on the business on his own account.

Indeed in the affidavits filed for the plaintiff, it is sworn that Frazer's name was kept up in the shop after the assignment, because it was thought it would be advantageous in selling the goods, which is averring a deliberate intention to keep the public in ignorance that there had been a change in the ownership of the goods.

Whether, if the assignment had been registered, the jury would or would not have been justified by the evidence in treating the assignment nevertheless as fraudulent and colourable, we need not consider, because the first and more obvious difficulty in the plaintiff's way is that the bill of sale has never been registered, and that leaves only the question to be asked, whether under the circumstances shewn there was or was not that actual and continued *change of possession* which is indispensable where there has been no registry. I am very clear that there was not, for I take the statute to mean such a change of possession as shall be visible to others, and shall shew that the parties have acted openly and above board. Now for all that the rest of the world could tell, Frazer was as much the owner of the goods up to the time the sheriff came with the execution as he ever had been.

Other persons dealing with Frazer, or having claims against him, could not tell that instead of Pridham being his clerk, he and Frazer himself had become the clerks of the plaintiff. There was nothing to indicate that, but on the contrary some things were designedly done to produce the impression that there had been no change. I think the verdict was right.

BURNS, J.—I have come to the conclusion that the rule in this case must be discharged, though I have no doubt that the debt for which the assignment was intended to operate as a security was an honest one, but unfortunately for the plaintiff he has not taken the precaution, which he should have done, to have filed the transfer to him in the proper office. It is quite apparent from the testimony of the plaintiff's witnesses, that he was not anxious to do any thing, visibly or outwardly, which would show or convince others that an actual change, and a continued one, of the property had taken place. He appears to have desired that he might continue the business, and for his own purposes and benefit. I have no doubt that he did not wish that it should become known that Frazer, his debtor, had nothing whatever to do with the concern. Now this is just precisely what the statute was intended to guard against, and if creditors wish to avail themselves of that mode of dealing with the property of the debtor, they must take the method of giving notice to the world of ownership by filing the deed of transfer as directed. The debtor was employed as a clerk by the plaintiff, but it does not necessarily follow that the plaintiff may not have been in the possession of the property. His services may be very material to the plaintiff's interests, and I am not disposed to think that it is incumbent upon a creditor to dismiss the debtor entirely, in order that the statute shall be said to be complied with. If a reservation be made in favour of a debtor, and thereby it becomes binding upon the creditor to avail himself of the debtor's services, it would be very different, for then it might be argued that he was deriving a benefit or advantage from that which he had transferred. Questions depending upon what constitutes a change of and continued possession, may be illustrated by a reference to the cases on the construction of the bankrupt acts 21 Jac. 1, ch. 19, and 6 Geo. IV., ch. 16, where property is left in the possession, order and disposition of the bankrupt; and such questions, as observed by Mr. Justice Buller, in *Walker v. Burnell* (Dougl. 320), have much more of fact than of law in them. This expression was adopted in *Lingham v. Biggs* (1 B. & P. 89); and again in *Ham v. Baker* (9 East 241).

Mr. Justice Lawrence says : " And therefore it seems more proper in such cases to leave it to the jury to say whether, under the circumstances, the bankrupt had the reputed ownership of the goods at the time." This case was left fairly to the jury, to say whether the evidence convinced them that a change of the actual possession took place, and afterwards continued in the plaintiff. Upon a question of this kind the difficulty of determining in whom the possession is of the goods, is very much increased by the fact that the person in whose possession the property was seized was before the transfer undoubtedly the owner. In *Lingard v. Messiter* (1 B. & C. 308) Best, J., says, " The very fact of the continued possession of property by a person who at one time is found to have been the owner, raises a presumption that he still possesses it in the character of owner." And he further adds, " It was incumbent on the defendants to shew that the property was left in the possession of the bankrupt, under circumstances which could lead no man to suppose that he was the real owner."

This case presents itself in this way to the mind. The plaintiff doubtless is an honest creditor, and was seeking to make the goods pay the debt : the defendant is the sheriff, with an execution for other creditors, whose demands were equally just against the debtor. Then, as between the two, has the plaintiff complied with what the law required, in order to clothe himself with the legal title to the goods to the exclusion of the execution creditors. He did not file his transfer as provided for, therefore he cannot rest upon the deed. Then had he an actual and continued possession of the goods ? The jury have said he had not. Does the evidence support that finding ? I cannot say, after looking at the plaintiff's conduct with regard to the property, that the jury were not warranted in what they have said, or that if the evidence were submitted to another there is even a probability that it would be found different.

McLEAN, J., concurred.

Rule discharged.

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## STREET V. FAULKNER.

*Practice—Notice to party to attend as a witness—Payment of expenses.*

When a party to a suit is notified to attend as a witness by the opposite party, a proper sum for his expenses should be tendered with the notice, or judgment will probably not be given against him *pro confesso* if he should fail to attend.

ACTION for dower, claimed in the west half of lot No. 19 in the 1st concession west of Hurontario Street in the township of Caledon.

At the trial at Toronto, before *Burns, J.*, the defendant, who had been served with notice to appear and be examined on the part of the plaintiff, was called but did not answer, and the plaintiff thereupon urged to have the issue taken *pro confesso* in her favour.

It was objected for defendant that it was necessary to shew that a proper sum of money had been tendered to the defendant to pay his expenses, as in the case of a witness. The learned judge thought that was not necessary to be shewn, though the defendant, if he had attended, might have objected to giving evidence till his expenses had been paid; and he refused to enforce the provision against defendant of taking the issue as against him *pro confesso*.

A verdict having been found for demandant, *Flanagan* for the tenant obtained a rule *nisi*, on affidavits, to stay proceedings on the verdict, and for a new trial. He filed an affidavit of the tenant, that the demandant had accepted a sum of money from him in full satisfaction of her dower just before the cause was tried.

This was not denied on the other side, and on the 10th of February last the rule was made absolute by consent of demandant's counsel; but notwithstanding the rule had been thus disposed of, the court were pressed to intimate an opinion upon the question that was raised at the trial—whether a party who has given to the opposing party notice to appear and be examined, is not bound to tender to him reasonable expenses, in order to entitle him to ask to have the issue taken *pro confesso*, in case the party notified shall not appear on the trial.

ROBINSON, C. J.—As the case no longer waits for any judgment from us, I shall only state it to be at present my impression, that where a party in a cause desires to make a witness of the opposite party, he has no reason to expect the advantage of his testimony without tendering him a fair sum to bear his expenses. A suitor is under no obligation to be present in court when his cause is tried, though he is in most cases present. He may be living at a distance, and may be poor or infirm, and unable to travel on foot. The statute, however, is silent on the subject, and in cases where the expense would be little or nothing, I cannot say that we should hold the judge would do wrong if he should hold him bound to attend, and should take the case *pro confesso* against him if he failed, though we might perhaps in such a case grant relief under particular circumstances laid before us on affidavit.

It is proper, we think, as a general rule, that expenses should be tendered, and also that the party should have notice of what he is required to speak to, for we must all have observed that it has grown to be very much a matter of course to give notice to the opposite party to attend and be examined, though in very many cases when he comes he is not put into the witness box, which looks rather as if sometimes the party giving the notice speculated upon the chance of gaining an advantage by the party not complying with it, although that compliance might not always be convenient, if he is to pay his own expenses. And it is material to consider that in all those cases in which the party who has brought his opponent to court does not call him at the trial, the person so attending has not the opportunity of exacting his expenses before he is sworn.

We think, therefore, that a proper sum for expenses should be tendered, and that it ought to be understood that when that is omitted the party giving the notice will not be likely to gain any advantage from it if he should fail to attend.

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## REGINA V. DUNLOP.

*Indictment—Forgery—Jurisdiction of Quarter Sessions.*

Defendant was convicted at the quarter sessions on an indictment charging that he feloniously did offer, dispose of, and put off a certain promissory note, purporting to be made by one F. for the sum of £4 10s. with intent to defraud, he, the said defendant, at the time he so uttered and published the said note as aforesaid, then and there well knowing the same to be forged.

It appeared that some boys had been amusing themselves with writing promissory notes and imitating persons' signatures, and among them was one with F.'s name. The papers were put into the fire, but this note was carried up the chimney by the draft, and fell in the street, where it was picked up by defendant. A person who was with him at the time said that he thought it was not genuine, and advised him to destroy it; but defendant kept it, and afterwards passed it off, telling the person who took it that it was good.

*Held*, that upon these facts the defendant was guilty of a felonious uttering; but the conviction was quashed, for the indictment was defective in not stating expressly that the note was forged, or that defendant uttered it as true; and the case should not have been tried at the quarter sessions.

CRIMINAL case reserved.

*McMichael* for the prisoner.

The facts are stated in the judgment of the court, delivered by

ROBINSON, C. J.—The prisoner was tried at the general quarter sessions for the county of Ontario, on the 6th of January, 1857, and convicted on a charge of having “feloniously offered, disposed of, and put off a certain promissory note, purporting to have been made by one Thomas C. Foreman, knowing it to be forged.”

We suppose it was for a felonious uttering under the statute; and if so the first question is, was the offence properly cognizable at the quarter sessions? That question has not been raised.

The point reserved for our consideration is, whether upon the evidence the defendant was properly found guilty?

Some boys had been amusing themselves with writing promissory notes, and imitating names. The son of a merchant had written among other such papers a promissory note in the common form, and put the name of Thomas C. Foreman to it as maker.

The papers which the boy had been thus scribbling, he or

his father then threw into the fire, and it seems that this particular paper was forced up the chimney by the draft, and dropped down in the street near, for it was afterwards found lying on the ground near the house, with its edges singed. The defendant, while he was passing along with another person, picked it up. The two read it; the man in company with defendant told him that he thought the note was not good: that he supposed some boys had written it in joke; and advised him to destroy it. The defendant said he would put it in his pocket, and that it would do to trade horses with. This took place on the 14th of November, 1856.

A few days after defendant passed the note away to a person residing in Scugog Island in a horse trade, telling him that it was a good note, and that he had obtained it from a pedlar at Raglan. The person Dunn who took it afterwards presented it to Foreman, and then first found that it was not genuine.

The defendant, being arrested on the charge of passing admitted he had found the note as stated.

There was clearly no intention to defraud in the boy who made the false note. It was done merely in idle sport, and thrown into the fire. He therefore could not be convicted of forging the note; but it is another question whether the person who uttered the false and counterfeit instrument with a knowledge of the facts, and with an intention to defraud, could not be legally convicted of a felonious uttering.

We find no case like it; but we think upon reason and principle the conviction is sustainable. The instrument was *false* and *counterfeit*, and from its terms and appearance might, as we infer, impose upon any one not acquainted with the signature of Mr. Foreman, especially when backed by the representations which were fraudulently made by the prisoner. To *forg* in its general sense is to counterfeit, to falsify; though to convict the person who made the false instrument of a crime, the intent to defraud must be made to appear. And besides our statute 10 & 11 Vic., ch. 9, in several parts of it uses the words *false*, *forged*, or *counterfeit* disjunctively, when it speaks of felonious uttering. Here



then there was a false or counterfeit instrument fraudulently uttered by the defendant, and a forged instrument : that is, forged in the general sense in which the word *forged* is to be applied when the person who made it is on his trial for the forgery.

The defendant did not, it is true, know by whom or with what intent it had been made, though he had been told that it was not genuine, or suspected not to be so ; but he knew as much about it as many persons do know who pass off counterfeit bills or coin, knowing them to be counterfeit, for they often know nothing of who made the bills or false coin, &c., when, or whether with a fraudulent or a harmless intent.

The indictment, however, seems to be insufficient, for it only charges that the defendant " did offer, dispose of, and put off a certain promissory note, purporting to be made by one Thomas Foreman, for the sum of £4 10s. 4½d. with intent to defraud, he, the said James Dunlop, at the time he so uttered and published the said note as aforesaid, then and there well knowing the same to be forged." The indictment does not state in direct terms, as is usual, that the note was forged, but calls it " a certain promissory *note*," which means a true note ; and it does not charge the prisoner with uttering it as true.

There is also a very material thing to be considered in this case : the party should not have been tried at the Quarter Session upon such a charge. Forgery and perjury have been usually considered as not coming within their jurisdiction ; and there are good reasons given why they should not try them, even if they could legally do so ; but a stronger reason cannot be assigned, than that they have not power to pass such a sentence as the law assigns to the offence, and as may be called for by the circumstances of the case, to the full extent allowed by the statute ; or at least that their power to pass such a sentence seems subject to great doubt.

Conviction quashed.

## REGINA V. THE GRAND TRUNK RAILWAY CO. OF CANADA.

*Obstruction of highway—Leave of municipality—Form of indictment—New trial.*

The Grand Trunk Railway was indicted for nuisance, in obstructing a street in the town of Guelph, by occupying it with their road. It appeared that the municipality had passed a by-law allowing them to occupy the street with their railway, and ordering that for that purpose a portion of it should be closed altogether as a highway.

*Held*, that such by-law was not within the 12 Vic., ch. 81, sec. 192, and therefore that the notice there directed to be given was not required.

*Held*, also, that the consent of the municipality might have been given, under 14 & 15 Vic., ch. 51, sec. 12, by resolution as well as by by-law.

*Semble*, that the indictment should have been for carrying the railway along the street *without leave of the municipality*.

*Quære*, whether it is proper to grant a new trial, where an individual or a corporation has been once acquitted on an indictment, even in cases of misdemeanor.

INDICTMENT for nuisance, in obstructing a public highway commonly called Kent-street, leading from the market-place in the town of Guelph to the Yorkshire-road.

On the trial, at Guelph, before *Richards, J.*, it was proved that Kent-street had been a travelled street or highway: that the defendants constructed their railway along Kent-street towards Glasgow-street; that for 1,000 feet and more their railway line occupied one-third of the street, along the centre, being raised above the level of the street from one to ten or twelve feet, and that from Glasgow-street to the Yorkshire-road the railway line occupied *the whole street* by an embankment, which in some places was nearly thirty feet high.

Kent-street was originally ninety-nine feet wide. For the defendants a by-law was put in, of the municipality of Guelph, which provided for the street being thus occupied by the railway (a).

The counsel for the prosecution offered to prove that the formalities required by the 192nd section of 12 Vic., ch. 81, for making such a by-law valid were not complied with, no notice of the intention to pass such a by-law having been given; and that, as to that part of the by-law which authorised the entirely closing up a part of the street, it was illegal, under the general municipal act.

On the other hand, it was contended on the part of the defendants—1. That the indictment was insufficient, in not

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(a) See the by-law fully set out in the next case.

averring that the defendants were not authorized by the municipality to do what they had done, since the municipality could by law permit it; and he referred to statute 14 & 15 Vic., ch. 51, sec. 9, sub-sec. 5, and the same statute sec. 12, sub-sec. 1.

2. That at any rate it was shewn that the defendants were so authorized, and that the by-law not having been quashed it sustained what was done under it.

The learned judge held that after the by-law which authorised the closing up the street in one part of its length, such portion of the street ceased to be a public highway, and defendants could therefore not be indicted for obstructing it; and that as to the other part included in the description in the indictment, the defendants were authorised by the by-law to construct the railway, and the indictment did not charge that the railway was completed, and that the defendants had neglected or omitted to restore the road, but charged the single alleged fact of illegal obstruction; and on the whole evidence he charged in favour of the defendants.

*A. McDonald*, for the prosecution, obtained a rule *nisi* for a new trial for misdirection, relying chiefly on the authority of *Lafferty v. Stock* 3 C. P. 1 that the by-law, if passed without the notice required, must be treated as invalid, though brought only incidentally in question.

*Galt* shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

The clauses in the railway consolidation act, 14 & 15 Vic., ch. 51, which relate to passing along highways, are sec. 9, sub-sec. 5, and sec. 12, sub-sec. 1. The former of these clauses enacts, "that the company shall have power and authority to construct, maintain, and work the railway across, along, or upon any stream of water, water-course, canal, *highway* or railway, which it shall intersect, or touch; but the stream, water-course, highway, canal, or railway, so intersected or touched, shall be restored by the company to its former state, or to such state as not to have impaired its usefulness." The latter clause (12th) enacts that "the railway shall not be carried along any existing

highway, but merely cross the same in the line of the railway, unless leave be obtained from the proper municipal authority therefor ; and no obstruction of such highway with the works shall be made without turning the highway so as to leave an open and good passage for carriages, and on completion of the works replacing the highway, under a penalty of not less than £10 for any contravention ; but in either case the rail itself, provided it does not rise above or sink below the surface of the road more than one inch, shall not be deemed an obstruction."

Apart from this provision there is the general power given to the company to make their railway, and to carry it through any town, &c., without restraining them from obstructing or occupying any of the streets of the town, except by the clauses which we have cited.

This 12th clause, therefore, is not an enabling but a restraining clause, and the prohibition contained in it is that the company shall not carry their railway along any existing highway, without the leave of the proper municipal authority. The company are not *prima facie* committing an offence by carrying their railway along a street of the town, because the statute, in the fourth clause, gives them power to do that ; but if they have offended in the matter it must be by their having constructed their railway along a street *without the leave of the municipality*, and it is for having violated the prohibition contained in the 12th clause that they ought, I think, to have been indicted : this at least seems to me to be in accordance with the general principles of pleading, though there are cases which favour the position that where a company occupies a highway, or any part of it, without complying with what the statute which gives the permission makes it incumbent on them to do for the convenience of the public, they may be indicted in the ordinary manner for an illegal obstruction of the highway, since the power is only given to them on certain conditions, and if they do not observe those conditions they are to be looked upon as not having the authority.

But we do not consider that the defendants were liable to be convicted of nuisance on the ground on which it was



sought to make them liable, for they had, we think, the *leave of the municipality* under the by-law. The 192nd clause of 12 Vic., ch. 81, does not, in our opinion, apply to this case: that is a provision applicable only to by-laws passed in execution of the authority given by that act, for shutting up or altering roads, or opening new roads, upon the view which the municipality may take of the public interests affected by the proposed alteration. What has been done in this case was done under authority given by a statute passed some years afterwards for a special purpose which does not require the consent of the municipality to be given by a by-law, but merely provides that the railway company shall not carry their railway along a highway without the leave of the municipality. We think that leave could be given by a resolution as well as by a by-law; and that whether it is given in the one way or the other, all that is necessary *is the leave of the municipality*.

The provision in 12 Vic., ch. 81, sec. 192, was intended to secure to landed proprietors, through whose lands a new road was proposed to be opened, the opportunity of being heard against the measure; but no private individual, we think, has any right to be heard against granting the permission to take the railway along the street of a town. It is the public interests and convenience only that are to be considered in that case, and of them the municipal council as representing the community, is made the judge.

There are some other points in the case which it is not necessary for us to go into, under this view which we take of the main question. We will only therefore add that we think the rule *nisi* ought to have specified on what particular points there was supposed to be a misdirection; and that we do not yet feel clear as to the propriety of putting a defendant who has been acquitted on an indictment a second time upon his trial, even in case of misdemeanor, and where as in this case the indictment has been removed by *certiorari* into the Queen's Bench.

It is undoubtedly against the general current of authority, but we have no doubt of the power of the court to grant the new trial, and the case of *The Queen v. Chorley* (12

Q. B. 515) seems to support such a course, though it is any thing but a satisfactory authority upon the point, when we consider what is stated in the opening of the case, and in the note, and when we observe further that neither in the argument nor in the judgment of the court is any thing said upon the point which we now refer to. It is not improbable that both parties acquiesced in the course taken, from a wish to have the legal question determined without the expense and delay of a new indictment. It is remarkable that in *The Queen v. Leigh* (10 A. & E. 398) there is the same confusion as in *The Queen v. Chorley*; and when we read the whole case carefully through we are left in doubt whether what the court were asked to do was to grant a new trial, or to stay the entering of judgment upon the acquittal, till the same point could be raised and determined without prejudice upon the trial of another indictment preferred for a continuance of the same illegal nuisance. *Cricklade's case* (13 Jur. 33) is the strongest authority for a new trial, though in a case not precisely of this nature, but where the indictment was for not repairing. There are two later cases, *The Queen v. Botfield* (1 Jur. N. S. 594) and *The Queen v. Russell* (3 Ell. & Bl. 942), in which latter case the question was carefully considered, and the judgment of the court is much against the granting of a new trial after an acquittal upon an indictment like that now before us. The circumstances that this is a case not against an individual but a corporation, may lessen the force of the arguments against a new trial, but does not clearly make them inapplicable.

I do not give my opinion upon the point, whether a by-law which has been illegally passed, without giving such a notice as the statute in some cases require, but which has not been moved against and quashed, will sustain a proceeding that has taken place under it. For the reasons which we have given, we are of opinion that the rule for a new trial should be discharged.

Rule discharged (a).

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(a) See the next case.

## IN RE DAY AND THE TOWN COUNCIL OF GUELPH.

*By-law authorising railway to occupy streets—14 & 15 Vic. ch. 51, sec. 12—  
12 Vic., ch. 81, sec. 192.*

The town Council of Guelph passed a by-law, enacting that from the passing thereof the Grand Trunk Railway Company might carry their railway through the streets of the town, pursuant to the plan annexed: that a part of Kent Street as shown in said plan should be thenceforth stopped up as a highway, and might be appropriated by the company; that another street named should be diverted as so shewn; and that the by-law should be in force only on certain conditions mentioned in it.

*Held*, that such by-law was valid under the 14 & 15 Vic. ch. 51, sec. 12, without the formalities required by 12 Vic., ch. 81, sec. 192; and that the leave given by it might equally have been given by resolution.

*Held*, also, that if notice had been necessary the want of it should have been objected to without delay, not after the work authorised by the by-law had been completed.

*Alexander McDonald* obtained a rule *nisi* to shew cause why by-law No. 39 of the municipality of the town of Guelph should not be quashed, on the ground that the calendar month's notice, or any other such notice as required by statute 12 Vic., ch. 81, sec. 192, as amended by 13 & 14 Vic. ch. 64, schedule A., No. 34, was not given or put up.

The by-law was entitled, "A by-law to provide for the carrying of the Grand Trunk Railway of Canada through the town of Guelph, and for other purposes connected therewith."

It recited that it was expedient to make provision for carrying the Grand Trunk Railway through the town of Guelph, by and with the consent of the proper municipal authority in that behalf, and for other purposes connected therewith; and it enacted that from the passing of the by-law it should be lawful for the Grand Trunk Railway of Canada to carry the said railway through the said town of Guelph, and *through, over, and along* any of the highways streets, roads, squares, or public places within the same, and to keep and maintain the said railway so carried as aforesaid at all future times accordingly, pursuant in all things to a certain map or plan, profile, specifications and descriptions thereof contained in the several schedules thereunto annexed.

2ndly. That from and after the passing of the by-law, the street known as Kent street, to the easterly boundary of the Yorkshire-road, as shewn in the map annexed to the by-law, should be for ever stopped up as a street or highway, and

might be appropriated and used by the said railway company to and for the purposes of the said railway ; and that the street leading out of the north-easterly part of the market-place-square or ground in the town of Guelph, between town lot No. 1 and town lot No. 1029, should be changed and diverted, so as to pass through the said lot No. 1, pursuant to the plan annexed, and that all other the matters and things in the annexed schedules mentioned relative to the carrying the said railway by and through the town of Guelph, should be established and declared to be binding and effectual in all respects, so far as the same lawfully might be done by the authority of this by-law.

But the by-law was declared only to be in force on the following conditions therein inserted, viz :

That the company should be responsible at their own costs and charges for any damages or claims of any individual that might have lawfully arisen, or might at any time lawfully arise or be made, on account of the carrying the said railway through the said town, whether the same claim or damage to be direct or otherwise ; and should in all things abide by and observe all matters in the annexed schedule mentioned, shewn or contained, on their part to be observed and performed, and should at their own charges procure the right of opening the street or highway out of the market-square through the said town lot No. 1., and should erect or construct the passenger station for the town of Guelph on the lot No. 1029, and should pay the municipality £115 immediately after the passing of this by-law.

The schedule and map to be deemed to be incorporated with, and to form a part of the by-law.

Schedule A was a plan shewing the track of the railway through the town, and schedule B contained a specification and description explanatory of the plan.

In these it was explained that the railway was to cross certain streets mentioned, in its course west-ward from the market-place to the Yorkshire-road, and over which the railway was to be carried by a bridge ; and that the entrance into the market place, on the north side of the railway, between lots Nos. 1029 and 1, would be provided for



by opening a road on lot No. 1, as shewn in the plan : that the passenger station was to be on lot No. 1029 : that whenever the embankment was over four feet high in the market-square, and in Kent-street as far as Dublin-street, it would be supported by a sustaining wall not less than three feet high.

The applicant made oath that he was an inhabitant and rate-payer in the town of Guelph, and owned real estate situate in Kent-street : that no notice, as he believed, as required by sec. 192 of 12 Vic., ch. 81, was given of the intention to pass this by-law either by being printed or put up : that his property on Kent-street was injuriously affected by the railway being carried along that street, and that the railway company refused to make any compensation : that this by-law had not been specially promulgated to his knowledge.

*Galt* and *M. C. Cameron* shewed cause, and referred to *Regina v. the Grand Trunk Railway Company*, ante, page 121.

*McDonald*, contra, cited *Lafferty* and the Municipal Council of Wentworth and Halton, 8 U. C. R. 232 ; *Day v. The Grand Trunk Railway Company*, 5 C. P. 420.

ROBINSON, C. J., delivered the judgment of the court.

The general powers given to the municipal council of a town to stop up, widen, or otherwise alter any of the streets of the town, are to be found in 12 Vic., ch. 81, sec. 60, subsec. 1, and sec. 80 ; and for the restrictions which are placed upon their power we are to refer to 12 Vic., ch. 81, sec. 192, and 16 Vic., ch. 181, sec. 33, and in the argument we were referred to the case in this court of *Lafferty v. The Municipal Council of Wentworth and Halton* (8 U. C. R. 232).

All this however relates, as we have already mentioned, to the general exercise of the power where the end in view is the convenience of the public, without reference to any other object than the improvement of the highways themselves.

The railway clauses consolidation act, 14 & 15 Vic., ch. 51, sec. 12, passed after the general municipal act 12 Vic. ch. 81, gives power to railway companies, whose operation are to be governed by that act, to carry the line of their

rail across highways, streets, &c., and so every charter of a particular railway company gives it the same power of crossing and interfering with highways, without which it would be impossible to construct such works. Certain reasonable conditions, however, are generally annexed to the authority conferred in this respect, the only one of which that we have any occasion to consider is that contained in the clause of the railway clauses consolidation act which I have referred to, namely, that "the railway shall not be carried along any existing highway, but may merely cross the same, unless leave is obtained from the proper municipal authority therefor."

The proper municipal authority we presume to mean the council, and whether they need or need not to give their permission in the formal manner of a by-law is not made the question here, because that is the method which has been adopted, and there can be none more proper.

Now here the municipality of Guelph have, in the first place, given by their by-law a general power to the company to carry their railway through the town of Guelph, and over *and along* any of the highways, streets, roads, squares or public places within the same. And by the next clause of the by-law they direct that Kent-street, from the western boundary of Glasgow-street to the easterly boundary of the Yorkshire-road, shall be for ever *stopped up* as a street, and may be appropriated and used by the Grand Trunk Railway Company, for the purposes of their railway.

We know, by what was shewn to us on another occasion, when this authority given by the municipality was called in question, that in this part of Kent-street, from the make of the ground, the railway could be no otherwise carried along the street than by making a high embankment, which made it necessary to occupy the whole width of the street, or at least so much of it as to leave no space that could be safely and conveniently used for passing through it. The municipal council therefore, instead of merely allowing the company to carry their railway *along the street*, which they had an undoubted right to do,—although such permission might, from the nature of the ground, be, *in other words*, allowing

them to occupy the whole street,—have in express terms authorised that to be done (that is, the stopping up that part of the street) which their permission must have resulted in, whether they had so explicitly stated it or not. It is argued from that that the express enactment for stopping up the street takes the case out of the railway consolidation act, and places it under the control of the 192nd clause of the municipal acts, 12 Vic., ch. 81.

But we have already intimated that we do not think that clause applies to the case of any permission given under the 12th section of the railway clauses consolidation act.

For, *first*, that permission is not by the act required to be by by-law at all, and it is only to by-laws that the 192nd section of the municipal act can be applied.

In the next place, this is a power given by a subsequent act to that in which the 192nd clause is contained, and is not made subject to that restriction. And again, the objects which are intended to be answered by the 192nd clause do not seem to be such as the legislature can be reasonably supposed to have had in their contemplation when they were passing the 12th clause of the other act, for they clearly did not intend that the interest of any individual, or even the convenience of the public, should stand in the way, so as to prevent the railway being taken where it might be thought most eligible to place it. The only restriction is that before it shall be carried along a highway, there must be leave obtained from the municipality as representing the community. What it was intended to guard by that condition was that there should be a due regard paid to public convenience as respecting the use of the highway which was to be so interfered with. No individual could have an exclusive individual interest in the street itself, and if he had any such peculiar interest as would entitle him to compensation, the law provides in most cases for his obtaining compensation; but that has nothing to do with the municipality granting it.

The by-law shews that where the right of property of any individual can be directly interfered with by any thing which they were sanctioning by their by-law, they annexed conditions intended to insure the due protection of such individual.

We do not think we should act reasonably in setting aside this by-law, upon the objections which have been taken to it.

It authorises, it is true, a portion of Kent-street to be used *exclusively* for the purpose of the railway; in other words, to be stopped up as a street; which would have equally followed in this particular case, if they had simply allowed the railway to be carried along it. It is the *thing* we must look to, and not the mere form of words used in doing it. Besides, if notice had been necessary, whether it had been given or not would not and need not appear on the face of the by-law, and any one who meant to object on the ground that notice had in fact not been given, should have come with his objection without delay, and not after an expensive work had been completed and in use under the sanction of this by-law, which could not now be interfered with without great inconvenience to the public generally. The applicant says he relied on being compensated. If he acquiesced on that or any other ground, he cannot reasonably now ask us to set aside the by-law, after so much has been done under its authority.

Rule discharged, with costs.

## RAY V. GOULD ET AL.

### *Will—Construction of—Es'tate tail—Cross-remainders*

Andrew McLaney, by his will, after giving other land to his daughter, Hannah Crozier McLaney, "her heirs, executors and assigns for ever," devised the land in question to his son Andrew McLaney, "and to his heirs lawfully begotten, and to his grandson Jacob Crozier Ray other land, in the same manner, adding, "in the event of any of the above-named devisees, Hannah Crozier McLaney, Andrew McLaney, or Jacob Crozier Ray dying before they have (or without) a lawful heir, then his, her, or their devise or property given them by this will, shall be equally divided among the survivors or survivor; but if they shall all die without a lawful heir, then their property given them by this will shall be equally divided among my sister Elizabeth Saunders' children."

*Held*, That the devisees took an estate tail with cross remainders; and consequently, Andrew McLaney and Jacob Crozier Ray having died without issue, and Hannah having left children, that Jacob's share went to them, not to his heir at law.

Ejectment for one undivided moiety of lot No. 2 in the 4th concession west of Yonge Street, in the township of York. By consent of the parties, and by the order of



the Honourable Mr. Justice McLean according to the Common Law Procedure Act, 1866, a case was stated for the opinion of the court.

The following are the facts agreed upon, and out of which are raised the questions of law to be decided :

John McLaney, late of the township of Pelham, in the county of Welland, died seized in fee simple of the land in question in this cause, after the making of the will herein recited, and before the death of Andrew McLaney therein mentioned. The following is a copy of the material clauses of the will in question.

I, John McLaney, of the township of Pelham, in the county of Welland, in the district of Niagara, and Province of Canada, yeoman, do make and declare this my last will and testament in manner and form following, &c.

First. I give and devise to my daughter Hannah Crozier McLaney, all that my whole messuage and tenement, situate lying and being in the township of Pelham, county, district, and province aforesaid, which messuage and tenement is composed of the south parts of lots number four and five in the tenth concession of the said township of Pelham, containing forty acres (be the same more or less), which forty acres of land are thus described, that is to say, (giving a description by metes and bounds), to have and to hold to my said daughter Hannah Crozier McLaney, her heirs, executors, and assigns for ever.

\* \* \* \* \*

Fourth. I give and devise to my son Andrew McLaney, two hundred acres of land, being lot number two in the fourth concession of the township of York, west of Yonge Street, for the description of which reference is made to my deed for the said lot,—to have and to hold unto my said son Andrew McLaney, and to his heirs “lawfully begotten” for ever.

Fifth. I give and devise unto my grandson Jacob Crozier Ray, two hundred acres of land, being lot number seven in the third concession of the township of York, west of Yonge Street, for the description of which reference is made to my deed for the said lot, to have and to hold unto my said grandson Jacob Crozier Ray, and to his heirs “lawfully begotten” for ever.

Sixth. I also give and devise unto my said grandson Jacob Crozier Ray, two hundred acres of land, being lot number nineteen in the second concession of the township of York,

east of Yonge Street, for the description of which reference is made to my deed of the said lot, to have and to hold unto my said grandson Jacob Crozier Ray, and to his heirs "lawfully begotten" for ever.

\* \* \* \* \*

Eighth. In the event of any of the above-named devisees, Hannah Crozier McLaney, Andrew McLaney, or Jacob Crozier Ray, dying before they have (or without) a lawful heir, then his, her, or their devisee or property given them by this will, shall be equally divided among the survivors or survivor. But if they shall all die without a lawful heir, then their property given them by this will shall be equally divided among my sister Elizabeth Saunders' children.

I hereby nominate and appoint my friends John Brown O'Reilly and David Palmer Brown, the said John Brown O'Reilly of Wainfleet, and the said David Palmer Brown of Crowland, to be executors of this my last will and testament, hereby revoking all former wills by me made.

In testimony whereof I have hereunto set my hand and seal this second day of September, in the year of our Lord one thousand eight hundred and forty-five.

(Signed) JOHN McLANEY, (L. S.)

The said Andrew McLaney died about the second day of February, one thousand eight hundred and forty-eight, without issue.

The said Hannah Crozier McLaney, on the twenty-third of November, one thousand eight hundred and forty-seven, and in the lifetime of Andrew McLaney, intermarried with Thomas Gould (one of the defendants in this suit.)

The said Hannah died about the twenty-second of November, one thousand eight hundred and fifty, leaving two children of her said marriage, who are still living.

Jacob Crozier Ray died in June in the year one thousand eight hundred and fifty-four, aged seventeen years, without issue.

Thomas Ray, the plaintiff, is the father of the said Jacob Crozier Ray, and claims the land in question as the heir-at-law of the said Jacob Crozier Ray.

The question for the opinion of the court is, whether the said Jacob Crozier Ray took an estate in fee simple in the lands devised to Andrew McLaney, and which vested in the said Jacob Crozier Ray on the death of the said Andrew McLaney.

If the court should be of opinion that the said Jacob Crozier Ray took an estate in fee simple, then judgment by

default or upon confession may be entered for the plaintiff; but if the court should be of opinion that the said Jacob Crozier Ray did not take an estate in fee simple, then judgment by *nolle prosequi*, nonsuit, or otherwise, as this Honourable Court shall order, shall be entered for the defendants.

A *Wilson*, Q. C., with him *C. S. Patterson*, for the plaintiff, cited *Nanfan v. Leigh*, 7 Taunt. 85; *Matthews v. Gardiner*, 17 Beav. 254; *Varley v. Winn*, 2 Jur. N. S. 661; *Fearne on Con. Rem.* 486, 473, 481.

*Eccles.*, Q. C., contra.

ROBINSON, C. J.—This will has been well considered and is carefully drawn, though evidently not by a professional person.

First. I have no doubt that Andrew McLaney took an estate tail under the will, not only because the devise was to him and to his heirs “lawfully begotten,” which makes this a different case from that of *Matthews v. Gardiner*, in 17 Beav. 254, where the devise was to a person and his “lawful heirs,” but also on account of the direction in the 8th clause of the will, that if either of the two devisees shall die before they have (or without) a lawful heir, then the estate shall be equally divided among the *survivors*. This shews in what sense the word “heirs,” had been used in the particular devise to Andrew—that it must have meant heirs of the body—for Andrew could not have died without heirs in the general sense, while his sister, or his nephew, the other devisee, was living.

Jacob Crozier Ray, I think on the same grounds took an estate tail: and if it is necessary to determine the point with a view to its bearing on the ulterior question, my opinion is that the other devisee, Hannah Crozier McLaney, took also an estate tail, although the devise to her it not in the same form of words (*a*).

Secondly. Then Jacob Crozier Ray, on the death of Andrew McLaney without issue, became seized of an undivided moiety of his estate, and Hannah McLaney became seized of the other moiety.

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(a) *Nanfan v. Leigh*, 7 Taunt. 85; *Brice v. Smith*, Willes 1; *Nottingham v. Jennings*, 1 P. Wms. 26.

Thirdly. Hannah McLancy, the other devisee, afterwards dies leaving children, who still survive, and the estate devised to her, and her undivided moiety of her brother Andrew's estate, have vested in the heir of her body.

Fourthly. Jacob Crozier Ray, the last surviving devisee, having died without issue, the estate specifically devised to him, and his undivided moiety of Andrew's estate, both take, I think, the same direction; and the question is, where have they vested. The action before us concerns only Jacob's undivided moiety of the estate that had been devised to Andrew by his uncle.

Fifthly. I take it clearly to be a case in which cross-remainders have been created. In *Atherton v. Pye* (4 T. R. 710) Buller J., exactly hits this question, when he says: "This is a stronger case for raising cross-remainders than *Phipard v. Mansfield Cowp.* 797, for here, besides the words '*for default of such issue*,' namely, issue of all of them, the devise over is of *all* the devisor's estate. Now they cannot all go together but by making cross remainders between the grand-daughters." And in the same case Lord Kenyon says: "The testator clearly intended that the whole should go together; whereas, if no cross-remainders be raised between the grand-daughters, it would go to the right heir by separate portions on the death of each grand-daughter."

This is just the effect which it is the object of this action to produce, for if the plaintiff in this action (Jacob Crozier Ray's father) should succeed, he would take Jacob's portion out of the channel by which the whole, under possible circumstances, might have gone together to Elizabeth Saunders' children.

The plaintiff's action, I think, fails, the estate sued for being vested in the heir of Hannah Crozier.

The testator cannot be supposed to have contemplated the contingency of all the devisees dying at the same instant without issue, and if it should be held that the will did not create cross-remainders, either expressly or by implication, it would be impossible that the contingency ever could occur which would enable the devise over to take effect.

The testator evidently intended that his sister Saunders' children should have all the estates devised, in case there



should be no child of either of the devisees, living when the last survivor died, and that being so, he could not have meant otherwise than that the estates should be so limited as to continue subject to the influence of that contingency.

That would be the case if none of the estates devised to the three special objects of his bounty could go to the heirs general of any of the devisees, so long as both or either of the other devisees were living, or had issue living; but it would not be the case if, on the death of one of the devisees without issue, a share of the estate which came to him on the death of another of the devisees without issue could go, as the plaintiff in this action contends it must go, to his heirs general, for that would put such portion out of the reach of the contingency which would carry it, on the death of all the devisees without issue, to the children of Elizabeth Saunders.

I refer to *Wright v. Holford* (Cowp. 31), and *Phipard v. Mansfield* (Cowp. 797) as strongly in point,—the latter case shewing, as many later cases have also decided, that where the intention is so clear as I think it is in this case, an intention to create cross-remainders will be implied, though there be more devisees in tail than *two*. This distinction being now in a manner exploded, many old cases may be cited in favor of what the defendant contends for in this case, which would otherwise have borne against him, as in *Cole v. Levingston* (1 Ventr. 224), *King v. Rumball*, (Cro. Jac. 447), *Gilbert v. Whitty* (Ib. 655), *Chadock v. Cowley* (Ib. 695).

I refer also to the case of *Watson v. Foxon* (2 East 36), and to the latter case of *Vanderplank v. King*, reported in 7 Jur. 548. Also to *Marryat v. Townly*, 1 Vesey Senior 104; *Doe Burden v. Burvile* (2 East 47, note); 1 Saunders 185 *a*, note, in which the doctrine is extensively treated, and the case of *Doe dem. Gorges v. Webb*. (1 Taunt. 234), in which what is said by Mr. Justice Chambre very strongly applies to the present case.

In my opinion a nonsuit should be entered.

McLEAN, J.—The devise to the testator's daughter, of land in Pelham, is to her and her heirs, executors and assigns, for ever. The devises to Andrew McLaney and

Jacob Crozier Ray of 200 acres each in the township of York, are to hold to them severally, and to their several heirs *lawfully begotten*, for ever. In the 8th section of the will the testator provides that in the event of either of the devisees dying *before they have, or without a lawful heir*, then the portion of such one shall be equally divided among the survivors or survivor of them, but if all shall die without *a lawful heir* then the whole property given them by the will shall be equally divided amongst the children of his sister, Elizabeth Saunders.

The testator having clearly shewn his intention that the land devised to his son and to Jacob Crozier Ray should descend to their issue lawfully begotten, it appears to me that he must have intended in his devise of the land, in the event of either of them dying before *having or without lawful heirs*, to give the land to the survivors or survivor, and then to their heirs lawfully begotten, and that it is *only* in the event of all of them dying without *issue* that the land was to descend to the children of Elizabeth Saunders. When Hannah Crozier McLaney died in 1850, she was entitled to an undivided moiety of the lot devised to her brother Andrew, as one of the survivors, and Jacob Crozier Ray was entitled to the other half. Her lawful heirs are her children, and they upon her death, or one of them, inherited her estate, and are still entitled to it.

Jacob Crozier Ray died without issue, before *having and without* such a lawful heir as the testator intended should inherit his property, and it appears to me that according to the intention of the will his estate in the land is vested in the children of Hannah Crozier McLaney. It was only in the event of *all* the parties named dying without issue lawfully begotten that the children of Elizabeth Saunders were to become entitled; but as one of them has had issue, the contingent interest of the Saunders is cut off. It is, however, plain that the testator intended that the whole land should go to them in the event of a certain contingency, which could not be the case if the heir at law of the survivor were capable of inheriting any portion. But it may be said that though by the will the testator meant if *all* should die

without issue the land should go to his sister's children, yet that one of them having had and left issue, and that provision being thereby defeated, the estate of the one who has died since it was so defeated must descend to his heir at law there being no devise to the *heirs* of the other devisee—*Holmes v. Meynel* (Sir T. Jones, 172; S. C., Sir T. Raymond, 452). The intention, however, that the land should go to his own family, and to their issue lawfully begotten, is I think very manifest, and that intention would be defeated if the plaintiff, who is not of his family or kindred, could inherit a moiety as heir at law of his son. The devisees did not by the will take a fee simple estate in the land on the death of Andrew McLaney—4 T. R. 710; 1 Saund. 185; 1 Ventr. 224. They only took an estate tail, with cross-remainders; for if they should happen to die without issue the land would go to the children of Elizabeth Saunders; but as Hannah Crozier McLaney would have inherited the moiety of Jacob Crozier Ray had she survived him, her children or her heir at law, issue of her body, will take in the same manner and to the same extent as she if living would have done.

BURNS, J., concurred.

Judgment for defendants.

#### MARCH V. THE PORT DOVER AND OTTERVILLE ROAD COMPANY.

*Road companies*—16 Vic., ch. 190, sec. 53—*Pleading general issue "by statute."*

Where a road company were sued for not keeping their road in repair; *Held*, that they could not, under 16 Vic., ch. 190, sec. 53, plead the general issue, and give any special defence in evidence, the injury complained of not being any thing done by them in pursuance of the act, but a duty omitted.

CASE against defendants for neglecting to keep their road in repair, alleging that they took tolls thereon, and that it was and is their duty to keep the road in repair; that by reason of their neglect to do so the plaintiff, while travelling on the road, *with his horses and wagon*, had his wagon forced into a hole in the road, and the same and the harness, were thereby much injured, and plaintiff was thrown out of his wagon, and much bruised, &c.

Defendants pleaded not guilty, "by statute," not specifying any statute.

At the trial at Simcoe, before *Richards, J.*, it appeared that the plaintiff had hired a team from another man to carry a load of goods. It was objected, that it being proved that neither the horses, wagon, nor harness belonged to him, he could not recover to any injury done to them, but only such damage as the jury might think it proper to give for any injury done to the plaintiff's person.

The plaintiff, on the other hand, contended that he had a special property in the horses, wagon, &c., and was liable over to the owner, and could on that ground sue for the damage done to them; and moreover, that the plaintiff's right of property was admitted on the record, and only the negligence denied.

The jury found 15s. damages for the personal injury, and £11 5s. for the damages of the horses, wagon, and harness, and leave was reserved to defendant to move to strike out the £11 5s. from the verdict.

*Galt* obtained a rule *nisi* to that effect accordingly, to which *M. C. Cameron* shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

As I understand the evidence, a hole had been suffered to remain in the road for some weeks, and the plaintiff driving at night drove his wagon into it.

The defendants are sued for culpable negligence, as being bound to keep the road in repair; and as they have pleaded no other plea than not guilty, they cannot be taken to have put in issue the plaintiff's right to the wagon and horses, which he has averred to be his, unless having marked the plea "by statute" they can give all matter of defence in evidence under the general issue. The statute 16 Vic., ch. 190, sec. 53, allows all road companies formed as this has been, to plead the general issue and give the special matter in evidence, in actions brought against them for any matter or thing done in pursuance of the act. Now, if the evidence had shewn that the defendants, in order to repair or improve the road, had dug a ditch, or done something else, in a careless and improper manner, without using the necessary precautions, and if they were sued for an injury arising from



their doing what they had done improperly, then we think they would be entitled to the privilege given by this clause in making their defence, but we cannot hold that the merely allowing the road to fall out of repair is *any thing done by them in pursuance of the act*, it is only a duty omitted.

The defendants, if they meant to dispute the plaintiff's right to sue for the injury, should have pleaded specially, traversing his averment that the wagon, &c., were his.

This is the single point reserved for our opinion, and we are of opinion that the rule to strike the £11 5s. out of the amount of the verdict should be discharged.

Rule discharged.

REGINA EX REX. McKOEN V. HOGG, SITTING COUNCILLOR FOR  
WARD No. 1 IN THE TOWNSHIP  
OF EAST MISSOURI.

“ “ “ V. McDONELL, RETURNING OFFI-  
CER AT THE SAME ELECTION.

*Contested election—Right of appeal—12 Vic., ch. 81, sec. 152—Bribery.*

The judgment of the county court judge, in a contested election case, upon a question of fact depending on conflicting testimony, will not be overruled.

The intention of the statute was not to allow this, but to provide an appeal upon any legal question on which the case may have turned.

*Quære*, as to the effect of bribery at municipal elections.

In both these cases the relator was an elector, not an opposing candidate, and his complaint was that Hogg was illegally returned, not having a majority of legal votes, and that the opposing candidate (there were but two candidates) Lawrence Wheelan, ought to have been returned, having a majority of legal votes.

The votes objected by the relator were objected to on various grounds—non-residence within the ward at the time of the election; not being in the collector's roll, or in the copy; and as to some voters, that their names had been fraudulently interpolated; and it was also complained that some votes offered for Wheelan had been illegally rejected.

The returning officer's conduct was complained of as being partial and illegal.

The summons was made returnable before the judge of the county court.

Among other objections it was complained that the returning officer had himself voted, contrary to law. Without his vote the candidates stood each forty-six on the poll-book.

The judge of the county court, having heard the parties by their counsel, on the 31st of January, 1857, adjudged that five of the votes taken for Hogg were bad votes, not being of persons resident in the ward at the time of the election; and as to three of them, bad also as not being on the collector's roll for the ward, nor on the certified copy; and that one other vote was bad as being the vote of an alien: that the returning officer voted for Hogg, contrary to law (meaning, it is supposed, because in fact there was not an equality of legal votes for each candidate); and he struck off these seven votes of Hogg's, and also two other votes of persons whose names were fraudulently entered on the collector's roll just before or at the time of the election.

He found also that *four* votes offered for Wheelan were illegally rejected, and should be added to the votes for Wheelan. (Thus making the votes for Wheelan fifty, and for Hogg 37).

He found also that the returning officer had acted with gross partiality: that Hogg was not duly elected; and that Wheelan was duly elected, and ought to have been returned, and that he be admitted, &c.; and he gave judgment against Hogg, and against the returning officer as regarded the proceeding against him.

In this term *Eccles*, Q. C., moved in each case to rescind or reverse the judgment, on the ground that the judge should have ordered a new election, and not seated the relator.

ROBINSON, C. J., delivered the judgment of the court.

We see no ground for reversing or altering the judgment.

The 152nd clause of 12 Vic., ch. 81, makes the preliminary judgment of the single judge examined by the court out of which the summons issued in term time, on an application made within four days (as this was); and enacts that the same may be thereupon reversed altered or affirmed by such court, with or without costs, to be paid by the party against whom the decision shall be, as the court shall think fit.

We do not consider that it was the intention of the legislature, in making this provision, to throw open the decision of the judge upon the merits to be overruled by this court, in case they should differ from him in their estimate of conflicting testimony. It was rather, we apprehend, to provide an appeal from the judgment of the individual judge upon any legal question on which the case may have turned. We are indeed not asked to examine the judgment in regard to the soundness of the conclusion, so far as it establishes that the relator and not the sitting member had the majority of legal votes, but in regard only to that part of the judgment which seats the relator.

And we see no ground on which we are called upon to reverse that part of the judgment, but this; that evidence is now tendered to us on affidavit, and perhaps was also laid before the judge before he pronounced his judgment, though that is not clearly made out, that the relator had made or insinuated to one or more voters, before or during the election, an offer to give or lend him a sum of money for voting for him.

There is no allegation that any money was given, or actually offered or promised, or that any vote was by such means obtained.

We are clear we cannot on this ground interfere with the judgment. What the judge of the county court had to determine was, whether the returning officer ought to have returned the one candidate or the other, upon the proofs given in reference to the objections specified in the statement. That at least is the ordinary course; and if he saw that the returning officer, in reference to all such facts as he is authorised to determine and act upon, should have returned the relator, then he did right to adjudge the relator entitled to the seat, for that means no more than that he is *prima facie* entitled to the legal result of the election. The returning officer had no power to reject a candidate on an allegation of bribery. If bribing, or attempting to bribe, would disqualify a candidate, or otherwise make void the election, the late member, or any one interested, may now, by a proper proceeding, call on Wheelan to defend his seat. But we express no opinion of the effect of such evidence as was

offered. Our statutes do not, that we can find, make any express provisions to repress bribery at municipal elections, in imitation of those made in England by 5 & 6 Wm. IV. ch. 74. It would no doubt be an indictable offence.

Rule refused.

## CINQUIMARS ET AL. V. THE EQUITABLE INSURANCE COMPANY.

### *Insurance—Condition—Production of vouchers.*

One condition of a policy was that the assured should within a month after the loss, deliver in as particular an account thereof as the nature of the case would admit of, and make proof of the same by the production of his books of account and other proper vouchers, and give such further explanation thereof as should be necessary, and that until this was done the loss should not be payable. The company had required certain invoices, which the plaintiffs refused to produce, though it was in their power to do so; but the jury being satisfied on other evidence that the loss had been actually sustained, found in favour of the plaintiffs.

*Held*, that not having complied with the condition in the policy, the plaintiffs could not recover, and a new trial was granted.

COVENANT, on a policy of insurance for £1000, upon cloths and ready-made clothing, the property of the plaintiffs, contained in a certain store in Belleville, in Upper Canada, described in the policy. The policy was made on the 23rd of November, 1853, to be in force for one year. The declaration alleged a loss by fire on the 24th of May, 1854, to the full amount of the sum assured.

The defendants pleaded many pleas, some traversing different averments contained in the declaration, others setting up fraud in the application for insurance, and fraud in the statements made of the loss; and among the pleas there was one (the 7th) denying that the plaintiffs had, within the time required by the policy, delivered in "*as particular an account of the said loss as the nature of the case would admit.*"

In another plea (the 9th) the defendants pleaded that, "after the happening of the loss, to wit, on the 25th of May, 1854, the defendants required the plaintiffs to make proof of their loss or damage by the oath or affirmation of the plaintiffs, or one of them, according to the form used in the said office of the defendants, of which form the defendants then gave the plaintiffs full notice and license of inspec-



tion ; yet that the plaintiffs did not then, or at any time, make such proof, but wholly neglected and refused so to do ; without this, that the plaintiffs, or either of them, did in all things conform themselves to, or observe all and singular the said articles, stipulations, conditions, matters and things which on their part were to be observed and performed, according to the form and effect of the said deed or policy, and of the said proposals, in manner and form, &c.

In their 10th plea the defendants pleaded that after the loss, to wit, on the 25th of May, 1854, they required the plaintiffs, or one of them, to make proof of the said loss and damage, by the production of their books of account, and other vouchers, according to the terms of the 10th condition endorsed upon the policy, and set out in the declaration, but that the plaintiffs did not, nor did either of them, make such proofs, or produce the said books of account, or any of their vouchers, although they, the plaintiffs, then had such books of account and vouchers in their possession, and could and might have produced the same ; and so the defendants say that the plaintiffs did not in all things conform themselves to or observe all and singular the articles, conditions, &c.

The plaintiffs joined issue upon all the pleas.

By the 10th condition referred to, it was stipulated that within one calender month after the loss or damage had occurred, the insured should deliver in as particular an account of his loss or damage as the nature of the case would admit of, and if required make proof of the same by his oath or affirmation, according to the form used in the said office, and by the production of his books of account and other proper vouchers, and give such further explanation thereof as should be necessary, and should, if required, produce a certificate under the hands of three or more respectable householders, &c. ; and "*until such affidavit, account, and certificate are produced, and such explanation given, the amount of the loss shall not be payable.*"

At the trial, at Belleville, before Robinson, C. J., it appeared that a few days after the fire, viz., on the 29th of May, 1854, the plaintiffs, being indebted to Messrs. Brown, Swann & Co., assigned to them their claim to the insurance

money under the policy. The policy itself was not assigned to them.

It was proved that in March before the fire, stock had been taken in the plaintiffs' shop in Belleville, and they produced an account of sales made by them from the time of their commencing business at Belleville in October, 1853, to the time of the fire.

From a comparison of these, so far as reliance could be placed on the statements, and from other evidence, it would appear that the plaintiffs had goods consumed by the fire to a larger amount than was covered by their insurance in the policy on which they were suing, after allowing for about £700 worth of goods which were saved, though perhaps not certainly to as great an amount as was covered by all the policies which the plaintiffs had effected on the same goods. The agent for the insurance company desired to satisfy himself of the extent of the plaintiffs' purchases since they commenced business, in order that he might compare it with the amount of the sales which they had given in, which was £3021 1<sup>3</sup>s. 2d., deducting the plaintiffs' profit and by that means satisfy himself from disinterested testimony what amount of goods of the description covered by the policy they were likely to have had on hand when the store was burnt.

It was proved that the defendants' agent in Belleville, and the chief officer of the company in Montreal, had required from the plaintiffs, and from Brown, to have the invoices (or copies of them) of the goods sent to the plaintiffs at Belleville, but they were not furnished.

In answer to a call for such invoices, made on the 1st of July, 1854, the solicitor for the plaintiffs and for Messrs. Brown & Swann, the assignees, replied that the invoices having been burnt in the shop, they could not be furnished, and that the 10th condition of the policy referred to only required of the insurers "to deliver in as particular an account of the loss or damage as the nature of the case will admit of." In reply to that the defendants' solicitors wrote to the plaintiffs, on the 11th of July, that the defendants considered themselves entitled to the information required,

as an explanation that was within the 10th condition, and that was most reasonable to ask for : that as the plaintiffs had been so short a time in business, duplicate invoices could be procured by them of the goods they had purchased, and that until that information was given they had advised the defendants' agent to withhold the settlement of the claim.

The defendants, upon the trial, called Peter CinquMars, one of the plaintiffs, as a witness. He swore that he had been called upon for the information required, and that he could have given it without difficulty, for that he had furnished the goods to the establishment at Belleville from his own establishment in Montreal, he being a partner in both, and had purchased portions of the goods from other houses in Montreal, but that he had refused to furnish the invoices, or to give such other information as was required of him, because he did not wish to enable Brown & Swann to make good their claim against the defendants, until their other creditors, as well as Messrs. Brown & Swann, were settled with, not being willing that they should be paid to the prejudice of all the others.

In consequence of this information being withheld, the agent was only furnished with a list procured from the forwarders of a large number of boxes and bales that had been forwarded by certain steamers from Montreal. This list gave no account of the contents of the packages, or of their value, for the forwarders could give no information upon those points.

The learned Chief Justice told the jury that the plaintiffs seemed entitled to recover upon all the issues but those on the 9th and 10th pleas, for that he saw no evidence of fraud, either in obtaining the policy, or in the statement given in after the loss : that the fire appeared, from all that was shewn, to have been accidental, and that having heard all the evidence, they had probably little or no doubt that there were actually burnt in the store goods belonging to the plaintiffs of the description insured, and to the full amount covered by the policy ; but that he was bound to tell them that the law required the utmost good faith on the part of the insured, and that if they failed in complying with



any of the positive conditions of the policy, they were disabled thereby from recovering. He called their attention to the 10th condition of the policy, and told them that under that the defendants had a right to call for all material information which the insured could give respecting the value and description of the goods destroyed: that the production of invoices was proved to be commonly called for on such occasions, and was particularly called for on this, but that the information had been in this case intentionally withheld; for that although the invoices sent to Belleville might have been burnt, yet one of the plaintiffs swore that he could have supplied the information required from his own books as to a great part, and could easily have procured copies of invoices of goods furnished by others through him, but that he designedly withheld the information, and forbade the defendants from paying the insurance to Brown & Co., as assignees, not wising to facilitate a recovery in this action brought by them in the name of these plaintiffs. He remarked that the assignment made to Brown & Swann, not with the sanction or privity of the insurers, could not change the position or affect the rights of the latter, so as to make it incumbent on them to pay losses of the particulars of which they had in vain demanded information, such as it was usual in such cases to give, and which the plaintiffs had it in their power to furnish; and he told the jury that he could not say otherwise than that upon the evidence the defendants were entitled to a verdict upon the 9th and 10th issues, or at least upon the 10th.

The jury, however, gave a verdict in favour of the plaintiffs, for £1000.

*Galt* obtained a rule *nisi* for a new trial, the verdict being contrary to law and evidence, and the judge's charge, and because the defendants were entitled to succeed on the 9th and 10th pleas.

*O'Hare* shewed cause.

ROBINSON, C. J.—It is to be considered that the defendants here had insured another sum of £500 on the same goods, and one other company (the Ontario, I believe,) had insured £1000; and if all the policies were like the one sued



on, upon cloths and ready-made clothing, and not on general merchandise, the defendants might reasonably desire to be satisfied whether the insured had in their shop, at the time of the fire, £2,500 worth of that particular kind of goods, over and above what was saved.

That may have been made out certainly at the trial (though I do not say whether it was or not), and under that conviction the jury probably thought it just to allow the plaintiffs to recover the full amount of the policy sued upon, notwithstanding what I felt it my duty to say to them as to the effect of the evidence under the 9th and 10th pleas, and as to the absolute obligation upon the insured to comply with the condition respecting the giving all information required by the defendants, and in the power of the plaintiffs to furnish, respecting their alleged loss. I considered the only question under those pleas was whether that condition had been candidly and fully complied with or not.

The jury must, I think, have seen very clearly that it had not been, but they seem to have felt that they had a discretion to say that they were themselves satisfied as to the amount of the loss, and that the defendants might also be reasonably satisfied, whether they were so in fact or not.

It is right to remember in such cases, that the reasonable intention of this condition in the policy is to give the insurers the means of satisfying themselves as fully as they can be whether the claim for loss is just as to the amount, without the expense and trouble of litigation, and that it is not enough to say to them at the trial, "You must be satisfied with what you see and hear now that our loss was as much as we have stated." It is damaging to the reputation of an insurance company to throw impediments in the way of a settlement of any loss for which they are liable, and it is right that they should have all the information that they can reasonably require, in time to enable them to judge whether the claim is a just one, or one which they would be justified in opposing.

It was evident, and it was avowed, that the information was designedly withheld, because the plaintiffs did not wish to put the assignees in the way of obtaining the sum insured.

I must say that I think the defendants ought to have succeeded upon the 9th and 10th pleas, according to the evidence that was given, and the jury, by the verdict which they gave, took upon themselves improperly to nullify the 10th condition of the policy.

I think therefore there should be a new trial without costs.

MCLEAN, J.—In this case the plaintiffs seek to recover the sum of £1,000, on a policy of insurance entered into by the defendants for that amount, on goods in the plaintiffs' shop in Belleville. By the conditions endorsed on that policy the plaintiffs, as the parties insured, undertook, in case of any loss by fire to furnish such accounts and vouchers as should be required to establish the amount of their loss. After the fire, the defendants required the production of invoices, and other documents, to shew the amount of goods received by the plaintiffs; and as insurances had been effected in the other offices, such information was essential to enable them to judge of the extent of their liability. That information was not given, though it appears by the testimony that the invoices, or copies of them, might have been procured, and the information which was given was certainly of an unsatisfactory, because of an imperfect, kind. That goods exceeding the amount insured by the defendants were consumed in the plaintiffs' shop there seems to be no reason to doubt, but whether there were goods to the value of the whole amount insured in several offices, is not by any means clear; and as the defendants would only be entitled, under any circumstances, to pay in proportion to the loss, if less than the whole sum insured, the evidence should be clear, or at all events more distinct, on that head.

But the want of compliance with the 10th condition on which the policy was granted, seems to strike away the foundation of the plaintiffs' claim; for to entitle themselves to recover, they must be able to shew that they have strictly fulfilled on their parts all that they undertook to do when they accepted the policy

On these grounds, therefore, I think that a new trial must be granted.

BURNS, J., concurred.

Rule absolute (a.)

### GILDERSLEEVE V. CORBY ET AL.

*Shipping—Certificate of Ownership—Addition of owners—Place of Registration—Legal ownership.*

A certificate of ownership of a vessel under 8 Vic., ch. 5, sec. 2, is not invalid because the additions of the owners are omitted, the statute on that point being directory only.

*Held*, That under sec. 4 the owners, living at Bath, might properly register the vessel at Kingston.

*Held*, also, that under the various transfers set out below the plaintiff was the legal owner of the vessel.

REPLEVIN for the steamer "The City of Hamilton."

*Pleas*—1st. *Non-ceperunt*. 2nd. The steamer not the property of the plaintiff.

At the trial, at Kingston, before *Robinson*, C. J., it appeared that on the 6th of December, 1850, the collector at Kingston made his certificate of ownership under 8 Vic., ch. 5, sec. 2, of the "City of Hamilton" steamer, of *Bath*, burthen 240  $\frac{918}{3500}$  tons, built at Bath, (specifying the dimension, &c., as the act requires), and stating the owners to be William H. Davy, of the village of Bath, G. H. Davy, of the village of Napanee, and B. F. Davy, of the town of Belleville,—the first two owning each 20 shares, and the other 24 shares.

On the 10th of January, 1851, the Messrs. Davy, by deed reciting the certificate of ownership, for a consideration of £3,000, sold to Donald Bethune, of the city of Toronto, Esq., as the general partner in, and as representing, and for the use and advantage of, the limited partnership company of D. Bethune & Co., and his executors, administrators and assigns, the said steamer "City of Hamilton."

Of this sale a memorandum was indorsed on the certificate of ownership on the 24th of January, 1851, by the collector of Kingston.

(a) At a second trial the jury found in favour of defendants, on the defence set up in the tenth plea, and the court refused to disturb the verdict. The case is not yet reported.

On the 11th of January, 1851, by indenture of mortgage, Donald Bethune mortgaged the steamer the "City of Hamilton" to the Messrs. Davy, to secure £3,000 due on four notes due by him, for £750 each, payable at the times mentioned in the mortgage, of which mortgage an entry was made on the 28th of January, 1851, on the certificate of ownership, in which the parties were described as the said Donald Bethune, and the said William H. Davy, &c.

On the 13th of January, 1853, by deed reciting the certificate of ownership, and that James Cotton had mortgaged certain lands of his to J. H. C. and R. M., to secure £5,000 advanced by them to Donald Bethune & Co., and that he Bethune, was desirous of securing Cotton against any loss by reason of such mortgage, Donald Bethune, as general partner of the limited partnership, assigned the said steamer (with another steamer called the "Maple Leaf") to Cotton, with condition that if Bethune, as such partner as aforesaid, should pay the £5,000 to J. H. C. and R. M., when due, &c., the assignment should be void, and that if the money should not be duly paid Cotton should be at liberty to sell the boat, &c. An entry of this mortgage was made on the certificate of ownership on the 28th of January, 1853.

On the 27th of February, 1854, James Cotton made a deed to The Honorable J. H. Cameron, Esq., Samuel B. Harman, Esq., and James Bovell, Esq., trustees under the marriage settlement, &c., in which was recited the certificate of ownership, and sale to Bethune, and mortgage to Cotton, and that Bethune had paid £1,250 on account of the £3,000 mentioned in his mortgage to Cotton, but had neglected to pay the balance, with interest, by reason of which Cotton had been obliged to pay the money : and by this deed Cotton, in consideration of £3,750, paid to him by J. H. C., S. B. H., & J. B., trustees as aforesaid, sold the two steamers to them, subject, however, to the proviso for redemption contained in the mortgage to Cotton.

An entry of the assignment by Cotton of his mortgage from Bethune was made on the certificate of ownership, on the 1st of May, 1856.

On the 29th of April 1856, J. H. C., S. B. H., & J. B.,



trustees, made the deed to the plaintiffs in this action, wherein was recited the certificate of ownership and the chain of conveyance above mentioned; and by this deed the trustees, in consideration of £3,500, paid to them, sold and assigned the steamer "City of Hamilton" to the plaintiffs, subject to the proviso for redemption contained in the mortgage of Cotton.

On the 1st of May, 1856, an entry of this assignment of mortgage was made on the certificate of ownership.

On the 5th of February, 1856, judgment was entered in a suit of Dickey et al. v. Bethune, general partner of Donald Bethune & Co., in an action of debt, for £103 11s. 4d., on which a writ of *fieri facias* issued, and under that writ the steamer "City of Hamilton" was seized by the sheriff of the county of Frontenac, and sold to Geo. Draper, Esq., on the 12th of May, 1856, for £10; and on that day the sheriff made a deed to Mr. Draper, in which was recited the certificate of ownership, and the several mortgages and assignments; and he conveyed to him all the right and interest of Donald Bethune, general partner of Donald Bethune & Co., in the said steamer.

An entry of this sheriff's deed was made on the certificate of ownership on the 16th of May, 1856.

On the same 16th of May, Mr. Draper assigned, by deed, to the plaintiff Gildersleeve, all his right and interest in the steamer, for £10, and an entry of this assignment was at the same time made on the certificate of ownership.

Upon this state of facts, admitted by the parties, it was objected, on the part of the defendants, that the plaintiff was not in law the owner of the vessel, and that his claim to any property in her, either absolute or conditional, could not prevail—1. Because the original certificate of ownership in the Messrs. Davy was not according to the act, not specifying the additions of the owners; that is, their occupations.

2. Because some of the registrations of the subsequent transfers have the same defect; also, because the certificate of ownership was not obtained from the collector of the port to which the vessel belonged—namely, Bath—but from the collector of Kingston.

And a verdict was taken for the plaintiffs, with leave reserved to defendants to move to enter a nonsuit.

*Bell* obtained a rule *visi* accordingly. He cited *Watkins v. Corbett*, 6 U. C. R. 587 ; *Sherwood v. Coleman*, *Ib.* 614. *Eccles*, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

It is plain that the plaintiff derives, through the several assignments, supposing them to be valid, all the interest which *Bethune* assigned to *Cotton* ; and that, as against *Bethune*, and all claiming under him, he is entitled to the possession of the boat, as assignee of the mortgage to *Cotton*.

So far as the Imperial act 17 & 18 Vic., ch. 104, is concerned, we find that the object of the provisions made in what is called part 2nd of the act, is to enable the owners of British-built ships to claim the privileges of such ships ; and that the necessity for registration, and taking out a certificate of ownership, is not on other grounds imperative. And we do not consider that under our statute 8 Vic., ch. 5, the registration of a vessel would be void for not containing more than the names and place of abode of the owner, omitting his addition of mystery or occupation. The statute evidently, by the form it gives, intends that the addition shall be inserted, but I think we may look on that as directory.

Under the 4th clause of our statute, I think we may hold that *Kingston* is a port at which this vessel could properly be registered. The direction is, that she shall be registered not at *the* port at or near to which the owners, or some one of them resides, but at *some* port at or near to which such owners or owner resides. Bath we know to be a small port of entry near *Kingston*, which is a much more important point as regards shipping : and I think that under our act the owners, being at Bath, might register their vessel at *Kingston*.

But at any rate, if the registration of the Messrs. *Davy* as owners was void for any cause, then the steamer was unregistered when they sold to *Bethune*, in which case the 13th clause of our act would not apply, and the transfers from them and their assignees would not be void by reason of non-registration.

And here the Messrs. Davy are setting up no claim against this plaintiff, nor any one claiming by title derived from them ; and the plaintiff shews a double title to the steamer, first, as mortgagee, by assignment of Bethune's mortgage to Cotton, and next as owner by purchase under a *fi. fa.* against Bethune, of the absolute property in the vessel ; that is, the interest which remained in him as owner after he had made the two mortgages which he did make ; and this, under the 23rd clause of our act, is to be treated as the real ownership of the vessel, notwithstanding the mortgages given by Bethune. The defendant shews no title.

BURNS, J.—The substantial objections to the plaintiff's recovery made by the defendants appear to be two—1st. That in the certificate of ownership of the steamer, the addition of the occupation of the owners is wanting ; and 2nd. That upon the evidence it appeared that the original owners are still the proprietors, because they took a bill of sale back to themselves by way of mortgage, which was not proved to have been discharged or paid.

The second question is proper to be considered first. I quite agree with the learned Chief Justice at the trial, that if it were necessary to shew that the mortgage was paid or discharged, it would not have been proper to have assumed it to be so from the fact that notice had been served upon the agent of the defendant's attorney for the defendants to appear, and because they did not appear it might be taken *pro confesso*. It did not appear that the defendants were privy to the title derived from the Davys, or in any way could be supposed to be cognizant of the fact ; and to assume that they were so because they did not appear at the trial, even supposing the notice could be held as properly served, would be carrying an assumption beyond what would be reasonable. It does not appear to me, however, that it is of any consequence whether that mortgage was or was not discharged as affecting this action. The 23rd section of 8 Vic., ch. 5, enacts that the mortgagee shall not by reason of the mortgage be deemed to be the owner, nor shall the person making the transfer be deemed by reason thereof to

have ceased to be the owner, except so far as may be necessary for the purposes of rendering the vessel available, by sale or otherwise, for the payment of the debt for securing the payment of which the transfer was made. The effect of an outstanding mortgage upon property of this description, therefore, stands upon a footing entirely different from other descriptions of property, and cannot be set up to defeat the title of the mortgagor or those claiming from him, unless the mortgagee himself sets up his claim under his mortgage, or some one claiming under him, who uses it for the purpose of enforcing the debt created thereby.

If the defendants could not set up title in the Davys as mortgagees for the purpose of defeating the plaintiff, then the next question is, whether they can destroy the plaintiff's title under the first objection; namely, that the certificate of registry of the original ownership is void, because it does not give an addition to the names of the owners. There is nothing in the 2nd section of the act which requires such additions, except what is contained in the parenthesis in the form prescribed in the act. The enactment is "*the form of which certificate shall be as follows, videlicet.*" I look upon this as directory. The certificate says the owners have made and subscribed the declaration required by the act, and that is prescribed in section 6 of the act. It may be that the declaration contains the addition to the names of the owners, and that the officers at the customs accidentally omitted it in the certificate. I cannot bring my mind to think that this plaintiff must be said to have no title to the vessel, because some six years ago the officer may have accidentally forgotten to tell us whether the Davys were merchants or gentlemen. See Taylor et al. v. Kinloch (1 Stark, N. P. C. 175); Heath v. Hubbard (4 East 110).

I think the rule should be discharged.

McLEAN, J., concurred.

Rule discharged.

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## HUTCHISON v. BOWES, McDONELL AND COTTON.

*Limited partnership*—12 Vic., ch. 75, sec. 14.

Where a special partner of a limited partnership has once rendered himself liable as a general partner, under sec. 14, by interfering in the business, he continues so liable, and is not relieved, after he has ceased to intermeddle.

This was an action upon three notes, alleged to have been made by defendants under the name and firm of Donald Bethune and Co., payable to the plaintiff or order; and upon common counts for goods sold and delivered, money paid, and account stated. The trial took place at Toronto, before *Hagarty, J.* There was nothing to distinguish the case in substance from that of *Bowes and Hall v. Holland et al.*, 14 U. C. R. 316, in which it was determined, upon the facts found by the jury, that the defendant Bowes had so intermeddled in the business of the association as to make himself liable under the statute as a general partner, unless the finding of the jury that Bowes had not so intermeddled during the time that these causes of action of the present plaintiff were accruing; that is, since the summer of 1853.

The learned judge held, that if he had before that, by his conduct, rendered himself liable as a general partner, he would not cease to be liable because he had afterwards abstained; and on that direction the jury found for the plaintiff.

*A. Wilson, Q. C.*, obtained a rule *nisi* for a new trial, to which *J. Duggan* shewed cause, citing *Andrews v. Schott*, 10 Barr 37; Coll. on Part., sec. 99.

ROBINSON, C. J., delivered the judgment of the court.

We think the verdict is consistent with the evidence. Upon the testimony of Holland we think it clear the defendant, Mr. Bowes, did not confine himself "to examining into the state and progress of the partnership concerns, and advising as to their management," which he might have done without making himself liable as a general partner, but that he did, as well as the other members of the committee, "*transact business on account of the partnership*," thereby interfering in such a manner as under the 14th clause of the act subjects him to be deemed a general partner.

The committee were nothing less than a committee of management, of which Mr. Bowes was for a considerable time the chairman. They did more than advise, they directed and acted, and while they did that they could not escape the consequence of interfering in the transaction of the business by calling themselves an *advising* committee.

We are of opinion also, that there was sufficient evidence of Holland being authorised as general agent to make notes in the name of the firm, and that he was known by the defendants to be in the habit of doing so : and besides, these notes were given for the price of supplies furnished to the boats, for which the plaintiffs would be entitled to recover under the common counts.

The defendant, Bowes, having once rendered himself liable to be deemed a general partner, stands thenceforward upon the same footing as the other general partners, and we think there is nothing in the point of his having ceased to interfere in the business before these goods were furnished, if the fact were so.

Rule discharged.

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#### HITCHCOCK V. CRONKITE.

*Semble*, that a partner of the plaintiff, not joined in the action, is admissible as a witness.

This was an action of replevin, tried at Sarnia, before *Draper*, C. J. A witness was called for the plaintiffs, (William J. Mills) who it turned out was a partner with the plaintiff, and therefore ought to have been joined in the action, but was not. His competency was objected to, but the learned judge received his evidence.

A verdict having been found for defendants, *D. B. Read* obtained a rule *nisi* for a new trial.

ROBINSON, C. J., delivered the judgment of the court:

Mills' evidence, though he was a partner of the plaintiff, was properly received, we think, because not being a party to the record, the objection to his evidence seems to be reduced to the ground of mere pecuniary interest, which is

no longer an objection. The defendants might have pleaded in abatement, if they knew of Mills being a partner; but it is very possible they did not know it, and there is much force in the argument, that admitting the witness under such circumstances may lead to abuse, for a partner may be intentionally omitted to be joined, in order that he may make his appearance on the trial as a witness. That is true, but still the act must be carried into effect, and I hardly think that such a case comes within the meaning of the exception of persons on whose behalf an action is brought. We need not, however, pursue that question further, for the plaintiff's witness was received, and the verdict is in favour of the party objecting, so that can form no ground for our interfering.

The jury seem not to have credited fully his account of the transaction, and when we look at the whole case, we cannot say that they certainly came to a wrong conclusion.

Rule discharged.

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#### HAWKINS V. PATTERSON.

Where a judge's order has been obtained to alter the *venire facias* to another assize, it is no objection that the trial took place without the alteration having been actually made.

In this case *Eccles*, Q. C., moved for a new trial, on the ground that the *nisi prius* record did not authorise the trial, there being no alteration made in the *venire facias* from the previous assizes; and on affidavits.

Upon the affidavits a new trial was granted, and that part of the case is not material to be reported. As to the defect in the record, ROBINSON, C. J., in delivering the judgment of the court, said:—

“There is an order of a judge indorsed, allowing the *venire* to be altered to the assizes in October, but the *venire* for the previous assizes in May is left as it was, with a copy of the *fiat* for the alteration written opposite to it in the margin. The right day might be inserted at any time according to the judge's *fiat*.”

## ROBINSON V. BLETCHER ET AL.

*Sleigh upsetting—Runaway—Negligence.*

Action for negligence in driving a sleigh and horses against the plaintiff.

It appeared that the driver, to get better sleighing, had turned off the road to follow a track along the ditch at one side; and that in coming up again the sleigh upset, and the horses running away overtook and ran against the plaintiff. The passengers in the sleigh which was upset acquitted the driver of any negligence; but another witness, who was near at the time, said that he thought, if more care had been used in coming up, the accident would not have happened.

The jury having found for the plaintiff, a new trial was granted.

CASE for negligently driving a sleigh and horse against plaintiff and injuring him. *Plea*, not guilty.

The trial took place at Whitby, before *Robinson*, C. J., when a verdict was found for the plaintiff and £25 damages.

*J. D. Armour* obtained a rule nisi for a new trial on the law and evidence, and because the verdict was contrary to the judge's charge. He cited *Goodman v. Taylor*, 5 C. & P. 410; *Pluckwell v. Wilson*, *Ib.* 375; *Thorogood v. Bryan*, 18 L. J. (C. P.) 336.

*M. C. Cameron* shewed cause.

The facts of the case are stated in the judgments.

ROBINSON, C. J.—The declaration is imperfectly framed, some words appearing to be omitted. It is not stated who drove the defendants' sleigh and horse over and against the plaintiff, or that any one did it, but the words "drove the said sleigh," &c., are used, which seems to imply that the horses were under the guidance and direction of some one at the time the accident occurred.

The fact, however, was otherwise, as proved upon the trial. The defendants keep carriages and horses to hire; they had sent a sleigh with an experienced and steady driver, and a pair of quiet horses, to carry two or three passengers to Toronto. The sleighing was not good in some parts of the road, where the snow had been blown off the turnpike, and defendants' sleigh had in one part followed a track which went along a ditch by the side of the road. In driving up afterwards to the middle of the road the sleigh came to a sudden pitch or descent in the side of the road, which was hidden from view by a snow drift, and it upset and threw out the driver and the passengers. The horses unfortunately got away from the driver, and the sleigh having righted they



ran away, leaving the driver and all the passengers behind. After running along the highway about a mile and a quarter the runaway horses of the defendants overtook and ran up against the back of a single horse sleigh, in which the plaintiff was driving himself in the same direction, and threw him out of his sleigh and injured him severely. It was proved that the defendants' horses were properly furnished with bells.

Two of the passengers who were upset in the defendants' sleigh were examined on the trial, and fully acquitted the driver of negligence. As they represented the matter it was a mere accident, such as might have happened to the most careful driver. I told the jury that what they were to determine was whether the upsetting of the defendants' sleigh was or was not a more accident, no occasioned by culpable negligence on the part of the driver. I remarked that in such cases—that is, where a sleigh or carriage is upset, and the horses escape from the hands of the driver and run away, and do mischief to the person or property of other persons—one has seldom or never seen it attempted to make the owner of the runaway horses liable, though undoubtedly he might be liable where there was clear negligence in himself or driver, which led to the carriage being overturned, and the escape of his horses. If the defendants' horses had been carelessly left by the driver standing in the highway, while he was drinking or idling in a tavern (which we have often seen), and the horses had run away, and committed an injury to some one—in such case the right to recover would be clear; but here the question was whether the defendants' driver was driving negligently or unskilfully when he upset his sleigh (which really was not charged in the record, though it was intended to be), and so from this carelessness his horses got away from him. I told them, if they looked upon it as an accident not fairly imputable to negligence or want of skill, they should find for defendants.

My own impression at the trial was that the defendants could hardly be held liable, for the evidence was strong in their favour.

The jury, I dare say, felt much for the painful injury which

the plaintiff, an elderly man, had suffered, and they gave him a verdict for £25. I declined certifying for costs.

My brothers are both of opinion that the jury took too rigorous a course in holding the defendants liable under the circumstances, and I confess that was my impression at the trial. I think there should be a new trial, with costs to abide the event.

BURNS, J.—The verdict is not large, and if the plaintiff in truth was legally entitled to recover, the jury would have been very well warranted in giving larger damages. It appears to me, however, upon the evidence, that the plaintiff was not legally entitled to recover, and that the verdict should have been for the defendants. In *Pluckwell v. Wilson* (5 C. & P. 375), Alderson, B., stated, that where the injury arose *altogether* from an *accident* the defendant was not liable. In *Goodman v. Taylor* (5 C. & P. 410), the action was for injury done to a horse by a pony and chaise that had been seen standing in the street without any person to take care of them, and afterwards the pony was seen running away with the chaise, and ran against the plaintiff's horse, and those who saw these facts did not know what was the cause of the pony starting. On the part of the defendant, it was proved that his wife was holding the pony by the bridle, when a Punch and Judy show coming up frightened the pony, which almost pulled down the defendant's wife, and broke from her, and ran off. Lord Denman in charging the jury said, "if the facts are true as suggested by the defence, I very much think you will be disposed to consider this an *inevitable accident*, one which the defendant could not prevent." The case of *Rex v. Timmins* (7 C. & P. 500), was a case where two omnibuses were running in opposition to each other, and galloping along the road, and a person was killed. Mr. Justice Patteson, said to the jury, "the question here is, whether you are satisfied that the prisoner was driving in such a negligent manner, that by reason of his gross negligence he had lost command of his horses." In the case before us the learned chief justice told the jury what the law was, in accordance with what has been stated in the cases cited, but it

appears to me the jury have taken an erroneous view of the effect of the evidence to establish negligent conduct of the driver of the defendants' horses. The only witness upon whom the plaintiff depended to establish that point, stated that he was near the place where the defendants' sleigh upset and the horses ran away, and he saw that the driver left the centre of the road in order to drive in the ditch where the sleighing was better; but coming to a place where the road was not broken further in the ditch, he turned back to the centre of the road, and coming up the slanting side of the road the sleigh upset, and he thought, *if the driver had been more careful in coming up, the accident would not have happened.* He stated that other people drove in the same place, because the sleighing was better than in the middle of road. The witnesses on the part of the defendants were passengers in the defendants' sleigh, who could have no interest whatever in defendants' favour, for one of them was injured by the upset, and they stated that they had examined the place where the upset took place, and from the manner in which the driver managed his horses the upsetting of the sleigh, whereby he lost command of the horses, was purely accidental. The whole evidence shews that the driver was merely doing the best he could to make use of the snow left on the road, and was only exercising the same judgment that others had done in leaving the centre of the road to go into the ditch where the snow remaining made the track better. If the truth were known, most probably the plaintiff himself had driven his cutter in preceding the defendants' sleigh precisely in the same track. In the exercise of judgment, when we find a number of people separate and distinct from each other, acting upon their separate opinions, following the same course—though in the case of many individuals that may proceed from the mere fact of seeing and following the course which others have pursued, and thinking that what others have done may be done by them also—it does not appear to me to be a legal principle that gross negligence can be inferred or deduced from an accident happening to one, when perhaps five hundred others doing the same thing have met with no accident. Then the plaintiff's case comes to this—that

because the witness thought the driver might have been more careful in driving the sleigh up the slanting side of the road, when it was evident he merely followed the track, without any intention on his part to do otherwise than what seemed right and for the best, the defendants should be answerable for the consequences. It is not easy to define what the meaning of negligence is, in order to enable one to sustain an action against another for an injury proceeding from such a cause, but it appears to me, taking all the facts proved in this case to be true. I cannot deduce from them a cause of action against the defendants. The verdict should therefore be set aside, and a new trial granted.

McLEAN, J., concurred.

Rule absolute.

IN RE STODDART AND THE MUNICIPALITY OF THE UNITED  
TOWNSHIPS OF WILBERFORCE, GRATTAN, AND FRASER.

*By-law—Overseers of highways—Statute labour.*

A by-law directing that the overseers of highways should bring any person refusing or neglecting to perform statute labour, before the reeve of the municipality, or the nearest J. P., who upon conviction should impose a fine of 5s. for each day's neglect, with costs, and adjudge that the payment of the said fine and costs should not relieve him from performance of the labour; and in default of payment should issue a distress warrant. *Held good.*

*Phillpotts* obtained a rule on defendants to shew cause why their by-law passed on the 15th of April, 1856, No. 18, should not be quashed in part—that is, as to the 6th section thereof—with costs, on the ground that such part is void and illegal, and beyond the power of the municipality to pass.

The by-law moved against was passed for defining the duties of overseers of highways, and determining the fines to be paid by persons neglecting to perform statute labour.

The sixth clause was in these words, “ And it is further enacted that the said overseers of highways, are hereby directed and required, on the refusal or neglect of any person within their section liable to perform statute labour, to go before the reeve of this municipality, or the nearest justice of the peace, and make oath of the refusal or neglect of such person, whereupon the said reeve or justice shall issue a



summons to have the party so offending brought before him, the said reeve or justice, and upon conviction shall impose a fine of five shillings for every day he has refused or neglected to perform the statute labour due by him, with the costs of prosecution, and adjudge that the payment of the said fine and costs shall not relieve him from the performance of the said statute labour, but that the defaulters shall still be required to perform the same, notwithstanding the payment of the said fine and costs ; and in default of the payment of the same the said reeve or justice of the peace shall issue a distress warrant against the goods and chattels of the defaulters, that the amount of the fine and costs may be recovered by sale of the same."

The objections were that there is no provision made by statute 16 Vic. ch. 182 (the assessment act), for enabling municipalities to enforce the performance of statute labour, or to inflict penalties for the non-performance. That no by-law had been passed, authorising a commutation of the labour by paying money in lieu, according to the 36th section of 16 Vic., ch. 182; and that there was no special or other promulgation of this by-law, according to the 155th section of 12 Vic., ch. 81, as amended by 14 & 15 Vic., ch. 109.

*Richards* shewed cause, *Connor*, Q. C., supported the rule.

ROBINSON, C. J., delivered the judgment of the court.

We see no valid objection to the sixth section of this by-law. There is no question about commutation. For all that is shewn, all persons in these townships have to perform their statute labour when warned, and this by-law provides only for enforcing the performance of such labour and in a manner in which the municipality has power by law to enforce it—that is, by fine. This authority is given by 12 Vic., ch. 81, sec. 31, subsec. 28.

We cannot conceive what can have been meant by the last objection taken to this by-law—that it was not promulgated according to 12 Vic., ch. 81, sec. 155, as amended. That provision applies only to a certain class of by-laws very different from this.

Rule discharged, with costs.

## JACOB PERLET V. MARGARET PERLET.

*Award made without hearing counsel—Contract of infant for service with parent.*

Where counsel had agreed to submit their views on a legal point in the case to the arbitrators in writing, and the arbitrators decided without waiting to hear from them, the award was set aside.

*Quære*, whether if an infant hire himself for wages to his parent, the contract is binding on the latter.

*Rolland Macdonald*, Q. C., for the defendant, moved on affidavits to set aside an award made in this case.

*R. Miller* shewed cause, in the first instance. 1 Bl. Com. 453; Ambl. 301; Co. Lit. 87, note 6; Kent Com. II. 193; Forsyth on Infants, 9, 10, 16; Bingham on Infancy, 6, 158; *Sprague v. Nickerson*, 1 U. C. R. 284.

The facts of the case appear in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

The plaintiff sued his mother, the defendant, in an action on common counts, for work and labour, and on account stated. His claim is for two years and five months' wages.

The defendant pleaded non assumpsit, and set off.

At the trial the verdict was taken by consent for £150, and the case was referred to three arbitrators; the award of a majority to be binding: the award to be made on or before the first of December, 1856, with power given to the arbitrators to enlarge the time. The arbitrators had power to increase or reduce the verdict, or to award in favour of defendant.

The action is by a son who is still a minor (about twenty-one years of age at present), against his mother, for work done for her on the farm. The defendant is a widow, and the plaintiff alleges that in order to induce him to stay with her and work for her, she, being apprehensive that he was about to marry and leave her, agreed to give him a thousand dollars if he would remain on the farm and work for her for four years. He did remain, and managed the farm upwards of two years, and then they disagreed, and he left the farm, and has brought this action, not on any special agreement, but on the two common counts mentioned.

The affidavits filed on this application against the award shew, as we think, that the arbitrators were too hasty in

their proceedings. The counsel for both parties at first desired to be present, and contest the point before the arbitrators, whether the son could recover against his mother for work done by him while an infant. They afterwards agreed between themselves that they would waive attending personally, and that they should each submit his views in writing to the arbitrators. Neither of the counsel urged on the arbitration contrary to the agreement, but the arbitrators were unwilling to wait, and made their award in favour of the plaintiff, without hearing the counsel, or receiving any communication from them.

Upon the affidavits we think it is just that we should set aside the award, as being made without hearing the parties. But it is agreed, on both sides, that they do not wish to disturb the award, if in our opinion the plaintiff could have recovered at law, provided the trial had gone on.

And first, how would that be if the plaintiff could shew no express agreement by his mother to pay? Secondly, and if there was in fact such an agreement as the plaintiff asserts there was, is it binding? As regards the count on an account stated, the plaintiff could not be allowed to recover on that at a trial, for an infant cannot state an account, so it could not be mutual.

As to the other count, for work and labour, no assumpsit would be implied against the defendant to pay her infant son for his labour done for her on the farm of which she was in possession. The plaintiff is the eldest of seven children, and by his father's will entitled to a portion of the farm on which he was working for his mother. That does not affect the case one way or the other.

If there had been no express agreement to pay, there could be no question that defendant is not liable. As to the alleged agreement, there was one proved, to the effect that if the plaintiff, being about eighteen, would remain on the farm living with defendant, and work for her for four years, she would pay him a thousand dollars. He goes away before the time, and unless he was driven away without any fault of his, or the defendant refused to employ him, the agreement being entire for the four years, the plaintiff could not

recover for a portion of the time, even if he had been a stranger of full age, and had made such an agreement.

As to the cause of leaving, the evidence before the arbitrators was such that if it went to the jury it might support a verdict either way, according as the jury believed the statements of some of the witnesses or of the others.

But, first, is the plaintiff in a situation to recover on the common counts, upon proving his agreement to the satisfaction of the jury, and proving also that his ceasing to live with defendant and to work for her, was no fault of his, but of hers? We think he is not, but that he should sue on the agreement

But, secondly, supposing he had sued on the special agreement, and proved that he was obliged to leave the place, or to give up working; could he enforce the agreement?

There is no question here about confirmation, because the plaintiff *is not yet of age*.

If he had made such an agreement with any other person, it would have been only voidable, not void, and he could have sued before he became of age. But what consideration was there to support such a contract with his mother? Is she not entitled to the labour of her infant children while they live with her and are supported by her? I had certainly a strong impression that she was so entitled, and that it must follow, as a consequence, that an agreement by her infant son to labour for her must be held to be a contract not sustained by any valuable consideration.

It seems to me also that there are strong reasons of policy, as regards the due maintenance of domestic relations, against the supporting such a contract as binding on the parent.

But the judgment of the King's Bench in England, in the cases of *Rex. v. Inhabitants of Chillesford*, and *Rex. v. Inhabitants of Winslow* (4 B. & C. 94), is a strong authority in favour of the right of action under such circumstances. The language of the judges fully supports the validity of the the contract, and, as I conclude from the judgments, to all purposes.

Having called the attention of the parties to that judg-



ment, we do not decide any thing more in this case than is necessary for disposing of the rule before us.

We make absolute the rule for setting aside the award, leaving it to the parties to continue the litigation or not afterwards, as they may think advisable.

Rule absolute.

### GREAT WESTERN RAILWAY COMPANY v. ROUSE.

#### *Railway—Assessment of.*

Under the 16th Vic., ch. 182, sec. 21, only the land occupied by a railway is subject to assessment, not the superstructure.  
The decision of the county court judge upon such a point is not final.

This was an action of replevin, brought by the plaintiffs against the defendant to replevy two hundred cords of wood, lying at the Princeton station, in the township of Blenheim, in the county of Oxford, and of the value of £62 10s.; and by the consent of the parties, and by the order of the Hon. Mr. Justice Burns, dated 3rd of February, according to the Common Law Procedure Act, 1856, the following case was stated for the opinion of the court, without any pleadings:—

1. The Great Western Railway Company's line of railway passes through the township of Blenheim, which is a Municipal Corporation under the Upper Canada Municipal Corporation Acts.

2. For the year 1856, the assessor for the municipal council assessed the railway company thus:

Land in roadway through township	124 $\frac{78}{100}$			
acres .....		£1000	0	0
Station grounds 5 $\frac{75}{100}$ -acres .....		1000	0	0
Value of roadway .....		30000	0	0
		£32000	0	0

3. That the item of £30000 is for the superstructure of the road, in addition to the value of the land itself, which is included in the first sum of £1000.

4. That the land itself was assessed according to the average value of land in the locality, and the sum of £1000 expresses such value excluding superstructure.

5. That the railway company appealed to the court of revision of the municipal council, who confirmed the assess-

ment made by the assessor, and from this decision the railway company appealed to the judge of the county court, who, upon hearing the matter, amended the roll thus :

" Station and buildings.....	£1000	0	0
" Roadway and superstructure.....	21000	0	0
	<u>£22000</u>	<u>0</u>	<u>0</u>

6. That the judge, in the item of £21000, included the land, and also the superstructure, which he reduced to £2000 per mile instead of £3000 per mile as set down by the assessor.

7. That the superstructure at £2000 per mile includes rails, ties, chairs, and gravel for ballast.

8. That the defendant is the regular authorised collector for the municipal council, and has seized the wood to recover £44 3s. 5½d., the amount due by the plaintiffs for their proportion of the year's assessment according to the valuation of £22000.

9. That the rate, appointment of collector, levy and seizure, have been regularly and lawfully performed, subject to the legality of the assessment in respect of the superstructure.

The questions for the opinion of the court are :

*First*—Whether the assessment-roll shows that the company are illegally charged for superstructure.

*Second*—Whether the decision of the judge of the county court is final, so as to debar the plaintiffs from now repeating the objection to the assessment and rate in respect to superstructure, and from resisting the payment of the rate imposed in respect thereof.

*Third*—Whether the assessor having taken into consideration the average value of the land as aforesaid, his duty was at an end, and he could not add thereto the value of the superstructure.

If the court shall be of opinion in the affirmative on the first and third questions, or in the negative on the second question, then judgment shall be entered up for the plaintiffs for one shilling damages, and costs of suit.

If the court shall be of opinion in the negative on either the first or third questions, or in the affirmative on the second question, then that the defendant have judgment for a return of the said two hundred cords of wood, to hold to him irreplevisable forever, and his costs of defence.

*Irving* for the plaintiffs ; *Eccles*, Q.C., for defendant.

ROBINSON, C. J. delivered the judgment of the court.

We find nothing in any statute which relates to the question submitted in this case, besides the 21st clause of 16 Vic., ch. 182, and it was admitted on the argument that there is no other enactment on the subject.

The language of that clause is too plain to admit of doubt. The legislature has expressly directed what is to be assessed ; and in respect to the roadway, it is the actual value of the *land occupied by the road* which the assessors are to place on the roll, and it is in so many words directed that the value shall be *estimated according to the average value of land in the locality*. That excludes the superstructure, such as the iron rails, bridges, &c., and we have no doubt that was the intention of the legislature.

It is true that by the third clause of the same act the term *land* is made to include all buildings, or other things erected upon or affixed to the land, so as to form part of the realty ; but that is a general direction ; the subsequent clause (21st) provides in a peculiar manner for the case of railways, and makes it an exception to the general rule. The 26th and 28th clauses of ch. 182 only make the decision of the judge of the county court final in regard to such matters as are to be submitted to him : that is, any alleged over-charge or under-charge, or the wrongful insertion or omission of any person's name. We think, therefore, that the plaintiffs should have judgment for a shilling damages, for the question is not whether the superstructure upon the roadway has been over-valued but whether there was any authority for assessing it at all, and upon this point the judgment of the county court is not to be final. It is the act of parliament that must govern.

Judgment for plaintiffs.

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## BELL V. WHITE.

*Survey—Side line—Township of York—12 Vic., ch. 35, sec. 35.*

Where the lots in a concession ranging from east to west were not numbered *all the way* from the boundary line of the concession on the east, but two blocks of five lots each had been laid out in the original survey fronting on and towards that line, and the remainder of the concession in blocks of five lots each, fronting as usual on the concession line, and numbering westward *beginning at No. 10*. *Held*, that the 35th section of 12 Vic., ch. 35, would nevertheless apply, and that the side line of the lot in question (32) must be determined by the course of the eastern boundary line of the concession. *Held* also, that the last proviso in that section would not apply, so as to make the boundary line of the block in which lot 32 was the governing line, because the township was surveyed before the 27th of March, 1829.

EJECTMENT for the westerly part of lot 32 in the 3rd concession from the bay, in the township of York, tried at Toronto before *Robinson, C. J.*

The action was brought to try the boundary between lots 32 and 33 in the 3rd concession, and brought up two legal questions, besides such points as were contested upon the evidence.

The township of York was originally surveyed by Mr. Augustus Jones and Mr. Aikin, in 1793. It was laid out in concessions ranging from the town line between York and Scarborough on the east, and to the river Humber on the west; and the lots were numbered from east to west. The 3rd concession was laid out thus: first two blocks of about 1000 acres each, with an allowance for road between them were laid out at the eastern end of the concession. Each of these blocks would have contained five lots, twenty chains wide, the ordinary width of lots in the township, fronting upon the 3rd concession line; but these two blocks were not so laid out, but were made to front towards the east—that is, towards the Scarborough line, while the remainder of the 3rd concession was laid out in lots of twenty chains, fronting as usual upon the concession line; and the lots in the concession were consequently not numbered in the ordinary manner, from the eastern town line upward, No. 1 beginning at the town line; but allowing for the breadth of two blocks laid out as described, the first lot numbering westward from those blocks was laid down as No. 10, and from thence the numbering went on westward in the usual manner, the whole concession being laid out into blocks of five lots of twenty



chains of front, with a chain allowed for a road between every two blocks.

The first question to be determined was, whether, such being the nature of the original survey, that principle of the survey act applied, which directs that in determining the course of the side lines between lots, they must all be so run as to conform to the course of the side line of the township, *on that side from which the lots are numbered.*

The defendant contended that they should not be so run out, because it could not be said in this case that the lots in the 3rd concession were numbered from the east end of the concession; that is, not all the way from thence, there being an intervening space between the first numbered lot on the third concession line and the town line of Scarborough.

2ndly. The defendant contended, that according to the 35th section of the present survey act, 12 Vic., ch. 35, the course between the two lots now in question, 32 and 33, was to be adjusted by the actual course of the eastern side line of the block in which these lots were situated, without reference to the town line.

All the road allowances which formed the exterior limits east and west of the second block of 5 lots each, which make up the third concession, were intended to be laid out on the same course as the eastern side line of the township. Yonge street is one of these roads.

The plaintiff had had the line on which he relied adjusted by the eastern town line. According to a line so run it appeared that defendant, who owned the east half of lot 33, was in possession of between four and five acres of the west half of 32, which belonged to the plaintiff.

The defendant endeavoured to shew that according to a division line run parallel with the eastern limit of this particular block, he had no more land than belonged to him. There was no dispute as to the front angles of 32 and 33.

The learned Chief Justice held at the trial, though not without some hesitation on each point, that notwithstanding the peculiarity in the original laying out of this concession, the eastern side line of the township was still that *from* which the lots were numbered, and that the general rule

applied to it. He held also, that nothing in the 35th clause referred to, would warrant the taking the eastern limit of the block in which these lots were as the governing line.

A great deal of evidence was gone into on both sides upon the subject of possession, in order to shew whether the defendant was or was not entitled to hold the plaintiff barred under the statute of limitations, as to the whole or any part of the land he was claiming. The evidence on that point was left to the jury, with such remarks as it seemed to call for.

They gave their verdict for the plaintiff, the effect of which, as it was stated at the trial, was to give to each party about the proper quantity of land, or at least much more nearly so than that line would for which the defendant was contending.

*Galt* obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection.

*Bell* shewed cause. *Eccles*, Q. C., and *Galt* supported the rule.

ROBINSON, C. J., delivered the judgment of the court.

There are no buildings affected by the dispute: and considering this, and that the verdict is not final, we are against disturbing the verdict upon the evidence.

The legal questions, however, must be considered.

I retain, upon each of the points, the opinion which I expressed at the trial, though I still feel, as I felt then, that they afford room for argument on the other side.

As to the effect of the survey of the concessions in blocks of five lots each, it would have been a judicious exception to have made in the survey act of 1819, that in such case there should be no occasion to go further than one of the exterior lines of the block, in order to ascertain the course of the side lines which should regulate the others; but no such exception was made, and the making a provision to that effect in the late statute 12 Vic., ch. 35, with regard to townships surveyed after a certain day, shews clearly that the legislature considered the rule as laid down in the first act not to admit of the exception according to the terms of that act, and that the township of York was surveyed at too early a

day to come within the terms of the late amendment relied on—viz., the 35th section of 12 Vic. ch. 35, is plain.

The last line in that clause makes it clear, we think, that the provision can only be extended to surveys made after the 27th of March, 1829.

Then as to the other point, turning also upon that direction in the survey acts which makes the course of the township line at that end of the concession from which the lots are numbered the governing cause.

The defendant contends that that can only apply in cases where No. 1 begins at the end of the concession; that is, when the lots number all the way from one end of the concession to the other, whereas here there are two blocks of 1000 acres, or 5 lots each, in which the lots range at right angles with the town line, and the first lot fronting on the concession is numbered 10 instead of 1.

We do not think that prevents the application of the rule, for we are to consider that all the side lines were intended to be on the same course, and that the meaning of the act was to secure a uniform course in fact.

The direction which the compass of the surveyor at that time indicated as the intended course, would be found marked at the end of the concession on the same line, and there was good sense in taking that to be the governing course throughout, as it would provide best for all the lines being parallel.

There can be no good reason given for not conforming to the rule, merely because there is a space next the town line not numbered at all on the concession line in question, for the same effect will be produced that is intended by the rule as in other concessions; and it is besides literally true that the lots in this concession do number from the eastern town line; that is, all that are numbered in that concession.

Rule discharged.

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## DAVY AND RUSSELL V. CAMERON.

*Death of plaintiff while rule nisi pending—Practice—C. L. P. A., sec. 248—Retrospective effect of.*

A trial of ejectment was had in 1854, and a verdict for the plaintiff. In the following term a rule *nisi* was obtained for a new trial, which owing to the loss of some exhibits, was not argued until 1856, and was then discharged; in the meantime the plaintiff died, leaving a will by which he devised the land to certain persons in trust.

ОРАНОІЯ

The court, on application, allowed judgment to be entered *nunc pro tunc*, and a suggestion to be entered of the death, leaving it to be afterwards determined whether the C. L. P. A., sec. 248, would apply retrospectively.

EJECTMENT, brought on the 14th September, 1853, for part of the west half of lot No. 1, in the sixth concession of Madoc (about ten acres).

This cause was tried in 1854, and a verdict rendered for the plaintiff, Colin Russell.

In Easter term, 1854, a rule *nisi* was granted for a new trial, or to restrain plaintiff from taking possession of any but a certain specified portion of the premises, which rule *nisi* was enlarged from time to time at the request of Russell's counsel, and was discharged in Trinity term, 1856—(See 14 U. C R., 483).

In February, 1855, \*Russell died, and defendant had continued still in possession.

In September, 1856, a judge's summons was taken out and served on\*defendant, to shew cause why the legal representatives of Colin Russell should not be allowed to enter a suggestion of his death after verdict, having first made a will duly executed, whereby he devised all his real estate to his wife, and two others, as trustees; and why upon such suggestion the devisees in trust should not have execution, &c.

This summons was enlarged till Michaelmas term, that the application might be made to the court.

Crooks, in that term obtained a rule to shew cause why the devisees should not be at liberty to enter a suggestion on the roll of the death of Russell after verdict, and of the devise to them in trust; and why, on such suggestion being entered, the devisees should not be entitled to have execution upon the verdict, by delivery of possession to them: or why judgment should not be entered; as of Easter term, 18 Vic.,



on the ground that the death of Colin Russell occurred during the pendency of the rule *nisi* against the verdict, and before judgment was given thereon.

*Richards* shewed cause, and cited *Vaughan v. Wilson*, 4 Bing. N. C. 175; *Freeman v. Tranah*, 12 C. B. 406; *Lawrence v. Hodgson*, 1 Y. & J. 368; *Doe dem. Taylor v. Crisp*, 7 Dowl. 584; *Fishmongers' Company v. Robertson*, 3 C. B. 970.

ROBINSON, C. J.—I doubt whether we can properly make the order desired as to entering a suggestion. If the 248th clause of the Common Law Procedure Act could be applied in an action of ejectment commenced before that was passed, which it is not necessary now to determine, I think it clearly could not be applied where, as in this case, the plaintiff died before the passing of the act.

The suit, it is contended on the other side, had abated, the long delay (much more than two terms), after the verdict, not being from any delay of the court in determining upon the application, but from the delay of the parties in urging it; and whether it was an intentional delay of theirs, or occasioned by any accident which the court could not be responsible for, would make no difference, as the defendant contends, but that the action must be looked upon as abated, for that judgment could not be entered in the name of the deceased plaintiff, as it might have been under the statute of 17 Car. II., ch. 8, if within two terms, or void after two terms, if the delay had been clearly the act of the court.

The circumstances which occasioned the delay in bringing on the rule *nisi* for argument, are stated in the report of the case.

When it was last before us (14 U. C. R., 488), I entertained then a strong opinion that we could not properly allow judgment to be entered *nunc pro tunc* under the circumstances. My brothers inclined to the contrary opinion; and as the cause of delay was rather an accident than *laches*, and there are some modern cases which shew a disposition in the courts to extend the indulgence, in their discretion, to

cases where it cannot be said that the delay arose from the act of the court (*a*), I do not oppose the allowing judgment to be entered as of the term after the trial. This, however, will only give to the personal representatives of Russell the means of recovering the costs of the action. The most important object is to obtain possession. It is no longer possible to give possession to the plaintiff, Mr. Russell, in whose favor the verdict was.

If this case could be treated as coming under the Common Law Procedure Act, sec. 248, we should have to consider whether the words, "legal representative of such claimant," as they stand in that clause, mean the representative of the title, or the heir or executor of the deceased plaintiff, according as he died seised of a freehold or a term. Considering the nature of the proceeding directed by the statute, and that it affords fair opportunity to the defendant to put the party who is dispossessing him to the proof of his title, I think the legislature probably intended that a person claiming from the deceased plaintiff as devisee, should be allowed to sue out a writ of revivor; and if so, that leaves no other difficulty than that which I have stated, that this proceeding given by the act can hardly be extended to a case where not only the action was brought, but the plaintiff's death also occurred, before the act was passed.

I doubt whether we can properly carry it back, but as I understand my brothers do not feel any difficulty on that point the rule can go, and the question can be brought up formally, if it shall be contended on the other side that the Common Law Procedure Act cannot be applied to this case.

BURNS, J.—I think the rule should be made absolute, that the judgment may be entered *nunc pro tunc* in favor of Colin Russell, for whom the verdict was found. The court granted a rule *nisi* on the application of the defendant, in the term after the verdict was rendered, which rule could not be brought on to be argued by reason of the exhibits filed at

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(a) See *Evans v. Rees*, 12 A. & E. 167; *Miles v. Bough*, 3 D. & L. 105.

the trial having been mislaid, and the rule was enlarged from time to time. Now although it may be argued that it was not the act of the court that the exhibits were mislaid, and could not be found, yet it was certainly the act of the court in granting the rule *nisi*, which prevented the plaintiff from entering up judgment upon the verdict; and if that rule had not been granted, the plaintiff could have entered up the judgment, whether the exhibits had been forthcoming or not. The want of the exhibits both parties have felt impeded their pressing an argument upon the court, and if they had argued the case without them the court would have felt that it was impossible to give any satisfactory decision. The cases are all collected in *Evans v. Rees* (12 A. & E. 167). Six years later Mr. Justice Wightman, in *Miles v. Bough* (3 D. & L. 105, 10 Jur. 390) considered the point again. There, as in this case, there was an argument upon the death of the plaintiff. It was a case involving questions of law and fact. After the trial of the issues in fact, the defendant moved for a new trial, and obtained a rule *nisi*, which upon argument was discharged, and then the plaintiff set down the issues in law to be argued, which did not come on to be argued for a year afterwards, before which time the plaintiff died. Mr. Justice Wightman said, "It was contended for the defendant, that the only cases in which judgment could be entered *nunc pro tunc*, were those in which nothing remained to be done at the time of the death of the parties, but to pronounce judgment; and the case having been heard, the court, instead of giving judgment immediately, took time to consider, and the death intervened before the judgment was pronounced. Upon examination, however of the cases which are reported on this point, it appears to me that the practice is of far more liberal extent; and in such cases as the present the court has allowed judgment to be entered *nunc pro tunc*, unless the delay is occasioned by the laches of the plaintiff, or some prejudice arose to the other party, to which he would not otherwise be subject."

Suppose then the judgment to be entered *nunc pro tunc*, the next question is whether, the judgment having been entered, and the death of the plaintiff having happened

before the passing of the Common Law Procedure Act, the parties claiming through the plaintiff are entitled to the benefit of the 248th section, to enter a suggestion upon which to have the benefit of the judgment, without being driven to a new action. I do not think that the representatives of the deceased plaintiff would be driven to a new action, even if the Common Law Procedure Act had not passed, for it appears to me their course would be to sue out a *scire facias quare haberent possessionem non* as respects the land, joining the personal representative in the writ as plaintiff, in order to have execution for the costs. See Foster on *Scire Facias*, 189, quoting Bac. Abr. "*Scire Facias*," C. 5.; Roll. Abr. 889, where it is said that in a real action the heir shall have the *scire facias*, and in a mixed action, if the lands to be recovered be fee simple, the heir and executor shall join in the *scire facias*, and the heir shall have the execution as to the lands, and the executor execution as to the damages. I understand the meaning and effect of the Common Law Procedure Act to be, that the writ of revivor and suggestion, the truth of which may be tried, are substituted for the *scire facias*. It appears to me the 248th section affected the state of the case as it then would have stood, if judgment had been entered and no delivery of possession thereupon had taken place. I see nothing to prevent the claimants having the benefit of entering a suggestion, and if the defendant denies the truth of it, then of course there must be a trial thereupon. It would be absurd to compel them to go over the same ground again in establishing their title, upon which the court has given judgment in favour of the person from whom they claim.

MCLEAN, J., concurred.

Rule absolute.

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## BLAKELY V. PATTERSON AND PATTERSON.

*Arrest for claim secured by mortgage—Action therefor.*

CASE, for malicious arrest on *mesne* process for £143, defendants having no reason to believe that the plaintiff was then immediately about to leave Upper Canada with intent to defraud them of this debt.

*Plea*—Not guilty. The trial took place at Belleville, before *Robinson, C. J.*, and a verdict was rendered for the plaintiff for £50.

*Wallbridge, Q. C.*, obtained a rule *nisi* for a new trial, on the law and evidence, to which *Henderson* shewed cause.

The facts of the case are fully stated in the judgment of the court, delivered by

ROBINSON, C. J.—The defendants had sold some machinery to the plaintiff Blakely and one Milner, for \$1,300 of which \$200 were paid down, and they gave two notes, for £137 10s. each, for the balance.

Milner gave a mortgage upon a town lot in Belleville, with a small house on it, to secure the payment of the notes. Several witnesses swore that the property mortgaged was worth about £225, others thought it scarcely worth £150.

Soon after buying the machinery, Milner absconded, and the plaintiff either sold or pretended to sell the machinery, which was yet unpaid for, to one Henshaw, who was a hired man of the plaintiff's.

After the first note became due, the defendants arrested the plaintiff Blakely for the amount of the note and interest.

The plaintiff contended at the trial that it was a malicious act to arrest him—1stly. Because he was not intending to leave Upper Canada, and defendants had no reason to suppose he would. 2ndly. Because the defendants were adequately secured by Milner's mortgage.

The defendants, as to the first point, produced a witness, one LaCroix, a hired man of the defendants, who told them that he had heard that the plaintiff was going to Wisconsin, and that they had better look after their debt; and defendants immediately thereupon had him arrested. The

witness swore that the plaintiff had told him he was going away, and that he had heard from another person that he was going to Wisconsin, in the United States.

The plaintiff endeavoured to satisfy the jury, by a cross-examination of the witness LaCroix, that he was a man unworthy of credit; and I think he succeeded in doing so, for though the witness at first denied it, he seemed afterwards to admit that he had been confined in the penitentiary.

Still this would not make it unreasonable that the defendants should act upon what he had told them, unless they knew him to be a man of bad character, and even then they might really believe that in this particular he was telling them what he had heard.

I told the jury that the circumstance of the defendants having a mortgage did not deprive them of the right to arrest on the notes. It was a collateral security, and they had a right to pursue in good faith whatever recourse was fairly open to them upon it: that it could only be material as tending to strengthen any other ground there might be for thinking that the defendants could not have thought, and did not think, that the plaintiff was about to leave Upper Canada with intent to defraud them, for if the debts were adequately secured, the plaintiff could not have imagined that he could defraud them of their debt.

But I told the jury that at any rate we could not tell what might be the nature of the title to the land mortgaged, or what there might be reason to suppose it would bring on a forced sale: that it was not sufficient that the property was worth enough to cover the first note, on which the arrest was made: that there would be nothing in the argument unless it would cover both notes, which none of the evidence proved that it would.

The second note was not due when the arrest was made on the first. My charge was not favourable to the plaintiff's recovery, for certainly the defendants were badly used in the transaction.

The plaintiff and his partners having sold the machine before it was paid for, and to a person in the employment

of one of them, and one partner having run away, there was some reason to fear the other was likely to follow.

I think it not impossible that the jury looked unfavourably on the defendants' conduct, from an idea that they had disingenuously put forward the witness LaCroix by an after-thought, to account for their having entertained apprehensions which the jury, it seems, did not believe they did in fact entertain.

The action seemed, however, to be rested mainly on the ground that it was malicious for the defendants to arrest when they were secured by mortgage. But in the first place they were not adequately secured, and at any rate had a right to sue on the notes, the mortgage being only collateral; and if a right to sue, then they had a right to arrest, if they seriously entertained the belief that the plaintiff was about to abscond. Upon that point, whether the defendants really had such apprehensions or belief, the fact of their being secured to a great extent by mortgage had some bearing. All was left to the jury, with a direction which is not complained of, for so far as regarded the real merits of the action, the tendency of my remarks was against the plaintiff, as I think the jury well understood.

The defendants did prove by a witness that he had himself told the defendants that the plaintiff was going away, and that they took out their writ upon that information, and on the same day; but I think the producing that witness had a bad effect with the jury, and that they neither believed what he stated, nor thought that the defendants could have put any confidence in his information, if he had made the statement which he said he did.

I think I should hardly myself have given a verdict for the plaintiff, but the case went fairly to the jury. I should have no objection to concur in granting a new trial, if my brothers had thought it the more proper course, but it is also my own conclusion that we should allow the verdict to stand.

Rule discharged.

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## DUSOLME V. HAMILTON.

*Bail Bond—Pleading—Nul tiel record—Proceeding in action, effect of.*

DEBT on bail bond. *Plea*, that the principal put in bail to the action according to the condition. *Replication*, that he did not cause special bail to be put in for him in said action. *Held*, that this was an issue of *nul tiel record*, which could not be tried by a jury.

It appeared that the plaintiff in the original action had proceeded to judgment. *Quære*, whether this was not a waiver of special bail; and whether, if so, defendant could rely on his plea as above, or should have pleaded the facts specially, or have applied to the court to stay proceedings.

DEBT on bail bond to the sheriff, for the appearance of one Christopher Columbus, in a suit of this plaintiff against him in the Queen's Bench.

Columbus having been arrested in the suit on a *Ca. Re.*, defendant and one Laing became bail to the sheriff for his appearance.

The plaintiff sued as assignee of the bail bond. Defendant Hamilton pleaded (30th August, 1856), that before this action brought, and within eight days of the service of the *Ca. Re.* on Columbus, Columbus put in bail to the action, according to the exigency of the *Ca. Re.* and the condition of the bail bond, and that the defendant Hamilton and Laing (the two bail to the sheriff) became the bail, "as by the said recognizance thereof remaining of record in the said court, fully appears."

On the 8th of September, 1856, the defendant replied, denying the truth of the plea, thus: "The plaintiff says that the said Christopher Columbus did not cause special bail to be put in for him in the said action, according to law."

At the trial at Barrie, before *McLean, J.*, it was admitted by the plaintiff's counsel, in opening the case, that a judgment had been recovered against Columbus, the defendant in the *Ca. Re.*: that the bond now sued on was assigned after the recovery in that action, and that Columbus and Laing having both left the province, Hamilton had on that account been sued alone.

The bail bond was executed on the 25th of August, 1855, and was assigned on the 5th of June 1856. Final judgment in the original action was entered (after trial) on the 9th of June, 1856.



The learned judge doubted whether, as the plaintiff had proceeded in the original suit to judgment, he had not thereby waived special bail, and whether the bail bond could properly be assigned after judgment recovered in the original action ; but he allowed the case to proceed, and a verdict was rendered for the plaintiff for £63 11s. 7d., leave being reserved to the defendant to move to enter a non-suit.

*Crooks* having obtained a rule *nisi* accordingly, *M. C. Cameron* shewed cause, citing *Betts v. Smyth*, 2 Q. B. 113 ; *Ede v. Collingridge*, 11 M. & W. 61 ; *Collett v. Bland*, 4 Taunt. 714 ; *Regina v. Sheriff of Middlesex*, 1 Ch. Rep. 393 ; *Pigott v. Truste*, 3 B. & P. 221.

*Crooks*, contra, cited *Whittle v. Oldaker*, 7 B. & C. 478 ; *Austen et. al. v. Fenton*, 1 Taunt. 23 ; Common Law Procedure Act, 1856, sec. 291 ; 12 Vic., ch. 63, sec. 24.

ROBINSON, C. J., delivered the judgment of the court.

The original suit being in the Queen's Bench, the recognizance of bail is a record of this court, and the existence of such a record being denied, the issue thus found is not one that could be tried by a jury.

The cases before this court of *Grantham v. Jarvis*, (6 U.C. R. 511,) and *Jones v. Ruttan* (12 U. C. R. 202), and the authorities cited in them, shew that an issue as upon a replication *nul tiel record* to the defendant's plea was sufficiently formed. It only required the naming a day for bringing in the record, which is the act of the court ; and the question being upon the existence of a record of this court, such as was pleaded, the court must determine that on inspection of its own record, and could not refer it to a jury. We must therefore set aside the verdict which was given for the plaintiff, and the parties will have the issue between them determined in the regular manner.

In the meantime the defendant should consider whether it is strictly true, as he has pleaded, that bail above was put in according to the condition of the bail-bond. He has pleaded as if bail had been put in regularly, and in due time. If the fact were not so, but he intends to rely upon the effect of the plaintiff's having proceeded in the original

action as being a waiver of bail, he must take care that he is safe in doing so.

It is not for us to advise the steps he should take; but the point he will have to consider, in case bail was not put in regularly and in time, is whether he is safe in pleading as he has pleaded, and relying upon the plaintiff being estopped by his conduct from denying the truth of his plea; or whether he should plead the facts truly as they were, and rely upon the plaintiff being disabled under the circumstances from taking an assignment of the bail-bond, and proceeding upon it; or whether he should apply to the court by motion to stay proceedings in this action.

We do no more at present than discharge the rule for entering a nonsuit, and make an order for setting aside the verdict, with liberty to the parties to amend their pleadings if they desire it, without costs, as the proceeding has been irregular on both sides.

Rule accordingly.

### ROBLIN V. MOODIE ET AL.

#### *Trespass—Estoppel—Pleading—Evidence.*

Where in trespass against the sheriff for taking goods the jury gave the full value of all seized, although the plaintiff had expressly claimed only a portion, declaring that the rest were not his, a new trial was granted.

Under a plea denying plaintiff's property, when the goods were not taken out of his possession, the sheriff may shew that an assignment under which the plaintiff claims is fraudulent; but he must prove the execution under which he seized, unless his warrant is produced reciting it.

TRESPASS for taking plaintiff's goods, tried at Belleville, before *Robinson*, C. J.

*Pleas*—1st. Not guilty. 2nd. The goods not the plaintiff's. Verdict for plaintiff £190.

*C. S. Patterson* obtained a rule *nisi* for a new trial on the law and evidence.

*O'Hare* shewed cause. *Simpson* supported the rule.

Authorities cited for plaintiff: *Grant v. McLean*, 3 O. S. 443; *Keaser v. McMartin*, 3 U. C. R., 327; *Pollock v. Fraser*, 4 U. C. R. 352; *Ashby v. Minnitt* 8 A. & E. 121.

For defendants: *Wordall v. Smith*, 1 Camp. 332; *Sm. Lea. Cas.* 12; *Tay Ev.* 1300.

ROBINSON, C. J., delivered the judgment of the court.

We think the damages given in this case were evidently excessive, and that the jury did wrong in giving a verdict against the sheriff for that portion of the goods which the plaintiff had declared to the sheriff were not his at the time they were seized, but belonged to Werden, then living at Syracuse.

They were found packed up in boxes, directed to Werden at Syracuse, and stowed in the barn of a neighbour, being taken there, as no one could doubt, to elude the search of the bailiff.

When they had been seized with other things, and were all in the sheriff's possession, this plaintiff came to claim some of the articles as his, and then he declared distinctly, according to the evidence, that as to this portion of the goods they were no longer his, but belonged to Werden.

According to the case of *Pickard v. Sears* (6 A. & E. 469), the plaintiff cannot afterwards be allowed to claim them against the sheriff as his, for the sheriff had a right to feel secure that this plaintiff at least would set up no interest in them, and would not afterwards complain of that as a trespass against him, which, according to his own declaration before the act was done, he had no right to object to.

We think the whole complexion of the case was unfavourable to the plaintiff upon the evidence, and that it ought to be submitted to another jury.

The defence that the assignment under which the plaintiff claims was fraudulent is, we think, open to the parties on the plea denying the plaintiff's property in the goods, unless when the goods were taken by the sheriff out of the possession of the claimant, who is not the defendant in the execution; but it was necessary that the defendant should have given in evidence the execution under which he seized, unless it was recited in the warrant given by the sheriff to his bailiff produced by the plaintiff (*Bessey v. Windham*, 6 Q. B. 166; *Ashby v. Minnitt*, 8 A. & E. 121.)

We are of opinion there should be a new trial, with costs

to abide the event, and with liberty to the defendants to amend their pleadings on payment of costs, if they desire it.

Rule absolute.

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PROCTOR V. JARVIS ET AL.

*Arbitration—Death of plaintiff before judgment—Proceeding ex parte.*

Where a plaintiff, in whose favour an award is, dies after the award, but before judgment, the suit does not abate, but judgment may be entered under the 17 Car. 11., ch. 8.

No execution, however, can issue in the name of plaintiff's executor without reviving the judgment.

Where a verdict was taken subject to arbitration, and an award made on the first day of the term following, on which judgment was entered soon after that term. *Held*, not too soon.

*Held*, that upon the facts stated below, the arbitrator was justified in proceeding *ex parte*.

Gladwin v. Chilcote, (9 Dowl. 550) and Scott v. Van Sandau (6 Q. B., 237), remarked upon.

A rule *nisi* was obtained by *M. C. Cameron* to shew cause why the award in this case, the verdict by consent, and the final judgment and execution, should not be set aside.

First, because the arbitrator proceeded *ex-parte*, and examined witnesses in the absence of the defendants, their attorney or counsel, and refused to postpone the proceedings, notwithstanding he was requested to do so on reasonable grounds.

Secondly. Because the submission was revoked by the death of the plaintiff before proceeding with the reference and making the award; and on the ground of merits disclosed on affidavits filed; or why the judgment and all subsequent proceedings should not be set aside for irregularity, with costs, because judgment was entered too soon, for the award not having been made till the second day of Michaelmas term, and no notice of the same having been given by the defendants during the said term, the judgment could not legally be entered till *after Hilary term*; and because the plaintiff died before the entering of the judgment, and there is no suggestion of his death upon the roll; and on grounds



disclosed in affidavits and papers filed; or why the execution should not be set aside with costs, on the ground that the same was issued after the plaintiff's death without a writ of revivor, or judgment being revived, or any suggestion or entry of the death being made on the roll: or why the cause should not be referred back to the arbitrators, on grounds disclosed in affidavits.

The cause came on for trial at Barrie on the 3rd of October, 1856, and was referred to the arbitration of Mr. Gowan, judge of the county court. A verdict was taken subject to be increased or reduced, or a verdict to be entered for defendants, by the award of the arbitrator, to whom the cause and all matters in difference between the parties were referred: award to be made ready to deliver to the parties or either of them, or if either of them should die before the making the award, then to the representatives of such party requiring the same, on or before the *first day of Michaelmas term then next*, with power to the arbitrator to enlarge the time. Costs of the cause to abide the event. Costs of the reference and award to be in the discretion of the arbitrator.

The arbitrator made his award on the 17th of November, 1856, that the plaintiff had a good cause of action against the defendant in the cause on the issues joined; and he awarded to the plaintiff £232 11s. 6d., to which sum the verdict was directed to be reduced; and that the defendants should bear their own costs of the reference, and pay the plaintiff's costs of reference, to be taxed; and that defendants should pay the costs of the award.

On the 13th of October, 1856, the arbitrator appointed the 29th of October, at Barrie, to proceed in the arbitration, stating in the written notice that in case of non-attendance of either party he would nevertheless proceed, and immediately make his award.

It was sworn by defendants' attorney that final judgment was entered on the 27th of December, 1856, for the sum awarded and costs—£287 19s. 7d.; that the award was made on the 17th of November, the first day of Michaelmas

term : that deponent had no notice of the award till some time after the first day of Michaelmas Term, nor had the defendants as he believed : that the order of *nisi prius* was made a rule of this court on or about the 24th of November : that the notice of the arbitrator, that he would proceed on the 29th of October peremptorily, was served on defendants' attorney about the 16th of October, of which he gave notice to defendant Thompson, the other defendant having gone to England before the action was commenced, and not having yet returned : that on the 28th of November (the day before the day appointed by the arbitrator) he saw defendant Thompson, who told him he had been sick for a week, and was just then able to go out; that his daughter was to be married on the next day (29th), and that he could not get his witnesses ; and he requested his attorney to get the arbitrator to enlarge the time ; that defendants' attorney did on the 28th of October send a message by telegraph to the arbitrator, stating these facts, and further that the deponent was then busily engaged at the assizes at Toronto, which were then going on, and requesting the arbitrator to put off the hearing till the next Monday, or other day convenient to himself : that the arbitrator replied by a message next day (29th), received too late to make it possible to attend at Barrie, that he could not take it upon himself to put off the case, the plaintiff's witnesses having come from a great distance, and that he should act accordingly : that the arbitrator proceeded on the 29th of October, and examined the defendants' witnesses, in the absence of the defendants and their counsel, and no one being present on their behalf : that the reasons assigned for asking to enlarge the time were, as he believed, true : that the plaintiff died before the entry of the judgment : that there is no entry of his death upon the roll, and nothing to warrant the issuing of execution against the defendants, which was then in the sheriff's hands, but no money had been levied thereon : that no copy of award was served on defendants before the 3rd of December last ; and that the submission was not voluntary, but was compulsory, under the Common Law Procedure Act.

The defendant Thompson swore that the plaintiff claimed

upwards of £430 by his particulars delivered : that he was prepared to go to trial at the assizes : that he was sick for about a week previous to the 29th of October, and unable to attend to the arbitration in consequence, and requested his attorney to apply to have the time enlarged : that it was impossible for him or his attorney to be at Barrie in time on the 29th, after receiving the answer : that he was informed and believed that the plaintiff died *long before the award was made*. He made also particular statements as to the merits, and swore that if the award should be set aside, and they had an opportunity of making a defence, they (the defendants) would be able to shew that they did not owe the plaintiff any thing.

The other defendant, Jarvis, swore that he never employed the plaintiff to do any thing for which he was demanding payment, and knew nothing of his claim : that he himself went to England before the declaration was served, and did not return to Canada till after the 29th of October last. He swore also to merits in the common form.

The plaintiff's attorney, Mr. Hopkins, made affidavit that the plaintiff was prepared to try his case at the assizes, having brought his witnesses from a great distance : that defendant Thompson told him during the assizes that he wished the cause could be postponed, or left to arbitration : that deponent then talked with him about the cause, and shewed him an account made by his, Thompson's, own clerk, according to which he would be willing to settle : that Thompson then said that the plaintiff was a trustworthy man and any thing he said might be relied on : that it was the fault of the other defendant that the plaintiff had not been settled with before : and he confirmed the account as correct, with some trifling exceptions : that the plaintiff's attorney was very unwilling to refer the case, though the defendants' counsel desired it, saying he was unprepared, and had no witnesses : that notice of the meeting on the 29th of October was served immediately : that on the morning of the 29th of October, the message asking for postponement arrived : that the plaintiff had then five witnesses attending from a distance ; that he consequently refused to consent to adjournment

being poor and unable to bear the expense of his witnesses coming a third time : that he offered to consent if Messrs. Patton & Cosens, who acted for defendant Thompson in other matters, would pay the expense of the witnesses : that they were applied to and declined ; that the arbitrator then determined to examine the witnesses on the part of the plaintiff, after which he would make a second appointment, if defendants desired to call them on their behalf and cross-examine them : that they were examined on the 29th of October for the plaintiff ; that on the 3rd of November the arbitrator did make a fresh appointment for the 14th of November : that neither the defendants nor their attorney attended on the 14th of November, and the award having to be made on the 17th, the arbitrator determined the case on the 17th : that all credits were allowed that were set down in defendants' account : that on the 15th of November he saw one of defendants' attorneys, and told him of the award that would be made, and asked the attorney why nobody attended : that the attorney replied that he could not get the defendants to do any thing, and that it was their own fault : that the plaintiff, as deponent is informed, died on the 18th of November, after the award was made and published : that the plaintiff had great difficulty in getting his witnesses, and he feared would be unable to procure them all again : that defendant Thompson was not in Barrie when the cause was called on, and had not been for two days before.

*Richards* shewed cause, and cited *Russ. on Arb.* 665, 244.

*M. C. Cameron*, contra, cited *Whately v. Morland*, 2 Dowl. 249 ; *Phillips v. Ingram*, 3 Dowl. 669 ; *Scott v. Van Sandau*, 6 Q. B. 237 ; *Gladwin v. Chilcote*, 9 Dowl. 550 ; *Dobson v. Groves*, 6 Q. B. 637 ; *Rhodes v. Haigh*, 2 B. & C. 345 ; *Cooper v. Johnson*, 2 B. & Al. 394 ; *Toussaint v Hartop*, 7 Taunt, 571.

ROBINSON, C. J., delivered the judgment of the court.

We understood at the argument that the plaintiff did not die before the award, but that he was dead when judgment was entered, which was soon after Michaelmas term, the



next term after award made, or rather the award was made on the first day of that term.

The case of *Rogers v. Stanton* (7 Taunt. 575) is applicable upon that point. The suit did not abate, because judgment under the statute 17 Car. II., ch. 8, could be entered on the verdict as amended by the award.

But no doubt on that judgment properly entered in the name of the plaintiff, an execution could not regularly be sued out in the name of the executor without reviving the judgment.

The judgment was not entered too soon. It all relates back to the time of the verdict. The case of *Cromer v. Churt* (15 M. & W. 310) is an authority on that point.

So whether anything more shall be done in the case than setting aside the execution, depends on the ground of complaints laid in the affidavits, that the arbitrator proceeded *ex parte*, when he knew that the defendants could not attend. The defendants have moved that it shall either be set aside or referred back on that ground.

As to setting the award aside on the other ground, that the arbitrator proceeded improperly *ex parte*, we think the defendants' case is so completely answered by the affidavits filed on the part of the plaintiff, that we cannot afford the relief asked.

It appears that one of the defendants was absent from the province when the action was brought, and till a short time before the award was made, but we must assume that he was rightly before the court, either by service being accepted for him, or by service being made in the manner allowed by law, or an application would have been made on his behalf. Besides the defendant is sued jointly with another, and pleas are put in the name of both.

The proceedings of the arbitrator were reasonable and proper. He evidently had every disposition to afford to both parties a fair chance of being heard. He gave notice in good time of his intention to proceed on the 29th of October, and then he would then peremptorily proceed with the case. The circumstances of the plaintiff's witnesses having to be brought from a distance, made it right that it should take

that course, in order to prevent unnecessary expense, and we may suppose that the time of the judge of the county court, who was the arbitrator in this case, is so taken up with the numerous courts he has to hold, that if he is to be made use of as an arbitrator it is of consequence that the appointments which he is able to make should be kept. The defendants seem to have made no preparation, nor given themselves any trouble about the defence. One of them was here. If unwell himself, he should have instructed his attorney, and sent for his witnesses, or at least should have asked for a postponement in time to prevent the plaintiff incurring the expense of taking all his witnesses to Barrie. There was no diligence used on the defendants' part. The offer of the party to enlarge the time if the defendants' agents in Barrie would pay the cost of the plaintiff's witnesses was a reasonable one.

Then after the arbitrator had heard the evidence, his leaving the matter open, and naming a day nearly three weeks from that time when he would hear the defendants' evidence, and when the defendants if they chose, could bring again before him those witnesses whom the plaintiff had produced, which would give them the same advantage as they had lost by not being present to cross-examine them—all this shewed a proper disposition to give the defendants every reasonable opportunity, but no attempt seems to have been made to take advantage of the opportunity, and the arbitrator was left to go on and make his award on the evidence which he had heard.

Then, again, after all it is urged that the award, which only allows to the plaintiff half of his demand, confirms the statement on his side that all the credits were allowed which were stated in the accounts made out by the defendants' own clerk, which it is asserted were taken as the basis of the award.

The case of *Gladwin v. Chilcote* (9 Dowl. 550), which was cited by Mr. Cameron for the defendants, is perhaps the strongest that could be produced in favour of the application, and it certainly does go a great length in extending such indulgence as is asked for here, and, as it seems to us, to

the very extreme limit of what should be done under such circumstances, if not beyond it. But when we consider the nature of the action in that case, and the other circumstances in which it differs from the present, it can hardly be said to sanction this application.

The latter case of *Scott v. Van Sandau* (6 Q. B. 237) is a more reasonable decision, I think; and others may be referred to in which the court has refused to set aside the award, where the *laches* of the party applying had been less than in this case.

We have considered whether we could with propriety remit the case to the arbitrator, on the terms that the defendants shall pay the expense of the plaintiff's witnesses on the last occasion, but looking at the affidavits which are before us, though we shall be glad if the parties shall agree upon that course, we do not feel that we can properly open the matter if the plaintiff resists it.

We therefore make the rule absolute as to setting aside the execution only.

Rule accordingly.

WATERS ET AL. V. H. S. LYON, ADMINISTRATRIX OF  
WILLIAM R. R. LYON.

*Bill of exchange—cancellation—Pleading.*

*Assumpsit* on common counts. *Plea*, as to £227, parcel, &c., that the plaintiff, in payment of the sum, drew on intestate in favour of M. or order, which defendant, as administratrix, accepted: that after such acceptance, and while M. was the holder, he, M., cancelled the said Bill and returned it to defendant. *Replication*, that M. received such Bill as plaintiffs' agent: that while he held it, defendant being entitled to certain insurance moneys for the loss of the goods for which said bill was drawn, and it being customary for plaintiffs in such cases to receive the insurance moneys, and apply them in payment of the goods, and M. being aware of such customs, and presuming that the insurance moneys would be received by the plaintiffs, returned the said bill to defendant as cancelled, without intending to discharge defendant unless such insurance money should be paid: that said insurance moneys were not paid to plaintiffs; and the price of said goods, and the said bill, still remain unpaid. *Held*, on demurer, replication bad.

*ASSUMPSIT*, on common counts, for goods sold and delivered, work and materials, money paid, and account stated, averring promises by intestate in his lifetime; and on counts for goods sold and delivered, money paid, and account stated, with

promises by defendant as administratrix—claiming £500 in each count.

*Plea*, as to £227 10s. 9d, parcel of the moneys in the second and subsequent counts of the declaration mentioned, and the causes of action in respect thereof, the defendant, administratrix as aforesaid, saith, that after making of the said promises as to the said sum of £227 10s. 9d., parcel, &c., and before the commencement of this suit, to wit, on, &c., the plaintiffs, for, and on account, and in payment of the said sum of £227 10s. 9d., made their certain bill of exchange in writing, bearing date on, &c., and thereby required the said William R. R. Lyon, six months after date thereof, for value received, to pay to one J. W. D. Maclagan, or order, at the Commercial Bank, Montreal, and not otherwise or elsewhere, the sum of £185 6s. 6d., sterling, in Halifax currency, at ten and a half per cent. exchange on London: that the said sum in the said bill mentioned, at the time of the making of the said bill, and when the same became due, was and still is of the value of £227 10s. 9d., of lawful money of Canada, which said bill of exchange the defendant as such administratrix as aforesaid, after the death of the said William R. R. Lyon, then accepted, for and on account of the said sum of £227 10s. 9d., parcel, &c., and then delivered the said bill so accepted to the said J. W. D. Maclagan: and the said defendant avers, that after the acceptance of the said bill by the defendant as administratrix as aforesaid, and which said acceptance of the said bill by the defendant as administratrix as aforesaid, the plaintiffs then accepted and received for, and on account, and in payment of the said sum of £227 10s. 9d. parcel, &c., whilst the said J. W. D. Maclagan was the holder of the said bill, and before the same became due and payable, according to the tenor and effect thereof, and before the commencement of this suit, to wit, on, &c., he, the said J. W. D. Maclagan, so then being the holder of the said bill, exonerated, absolved and discharged the defendant, as such administratrix as aforesaid, from, and then waived performance of, the promise and the payment of the said bill of exchange, and did then cancel the acceptance of the defend-



ant as administratrix as aforesaid of the said bill of exchange, and did then deliver the same bill of exchange, with the defendant's acceptance thereof so cancelled to the defendant; and the said bill of exchange so cancelled as aforesaid hath always hitherto remained, and still is in the possession of the defendant; and this the defendant is ready to verify, &c.

*Replication*—That at the time of the delivery of the said bill of exchange to the said J. W. D. Maclagan he was the plaintiff's agent, and received and held the said bill as such until the same was returned by him to the defendant as hereinafter mentioned: that after the delivery aforesaid, and while the said bill was in the said J. W. D. Maclagan's hands, the defendant, being entitled to certain insurance moneys in respect of the loss and damage of the goods for which the said bill was drawn, and it being customary for the plaintiffs in similar cases to receive the insurance moneys and apply them towards payment of the goods insured, and the said J. W. D. Maclagan, an agent of the plaintiffs, being aware of this custom, and presuming that the said insurance moneys would be received by the plaintiffs and applied towards payment of the goods for which the said bill was drawn, returned the said bill to the defendant as cancelled by the said insurance moneys, without any intention of discharging the defendant from her liability for the amount of the said goods, in the event of the plaintiffs' non-receipt of the said insurance money; and the plaintiffs further say, that the insurance moneys aforesaid, to which the defendant was entitled as aforesaid, were not, nor was any part thereof, at any time paid to or received by the plaintiffs; and the price of the said goods for which the said bill was so drawn and accepted as aforesaid, and the amount of the said bill, are respectively still wholly unpaid and unsatisfied to the plaintiffs; and the plaintiffs aver that the said return of the said bill to the said defendant, so cancelled as aforesaid, is the same delivery, cancellation, discharge, and waiver of performance thereof, pleaded and set forth in the said defendant's said twelfth plea.

*Demurrer*—That the said replication does not deny or confess and avoid the said plea: that the said replication

states that it was customary for the plaintiff in similar cases to receive the insurance moneys on goods sold by them, and apply them in payment of the said goods, and that in pursuance of such custom, they delivered up the said bill to the defendant as cancelled by the said insurance moneys; and seek to avoid the effect of such cancellation by alleging the non-receipt of such insurance moneys by the plaintiffs, without assigning or shewing any reason or excuse for such non-receipt of the said insurance moneys: that the said replication does not shew any claim or demand to have been made by the plaintiffs, or any person or persons on their behalf, for the said insurance moneys, nor in any way account for the non-payment thereof: that the said replication alleges and shews a duty on the plaintiffs to collect such insurance moneys, and apply them in payment of the said goods, and does not in any manner discharge or excuse the plaintiffs from the performance of such duty, &c.

*Galt* for the demurrer.

*Richards*, contra.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the plaintiff's replication is insufficient, and that judgment should be given for the defendant on this demurrer.

The plea states that the plaintiff accepted in satisfaction the acceptance of defendant, as administratrix, of a bill drawn upon the intestate, to whom the goods were sold. Her acceptance of that bill was an admission of assets by her, and would render her liable personally.

This would discharge, we think, the previous cause of action, and make it necessary for the plaintiffs to pursue their remedy upon the bill.

If the voluntary return of the bill to the defendant would revive the right of action on the common count, there could have been no sense in returning it, for the same evidence which would give a right to recover on the original consideration would shew that there was no defence against the action upon the bill. And at any rate what is set up in the replication can be no answer to the defence pleaded, because

it does not shew what occasioned the failure of the plaintiffs to recover the insurance money.

The defendant having the bill returned to her would of course assume that the plaintiff had been paid through the insurance office, and would take no steps in the matter; and for all we can see on the face of these pleadings the insurance money may have been lost by the *laches* of the plaintiffs.

The plaintiffs may amend their replication on payment of costs.

Judgment for defendant on demurrer.

### REGINA V. SULLIVAN.

*Criminal law—Illegal conviction for capital offence—Proceedings thereon.*

Where after conviction for a capital offence the proceedings were discovered to have been illegal, there having been no associate judge sitting in court during the trial, on motion on behalf of the crown (*the prisoner not moving in any way*), the indictment and conviction, with the prisoner, were brought up on *certiorari* and *habeas corpus*, and an order made setting aside all such proceedings, and remanding the prisoner to custody, *with a view to a new trial*.

ON the 27th of November, 1856 (in Michaelmas term), the Solicitor-General came into court, and in his place stated that in this case before Mr. Justice *McLean*, at Hamilton, at the last assizes, the defendant was convicted of murder, and had sentence of death passed upon him for the same, to be executed on Saturday next, the 29th, but it had been discovered, and represented since the trial by the defendant's counsel to the Government, that at the time of his trial there was no one sitting in the court as associate of the learned judge, as the commission requires: that is no one of the associates named in the commission, nor the clerk of assize, who is, by the 19 Vic., ch. 43, sec. 153, made an associate ex-officio. It happened in this way: the deputy-clerk of the crown is by statute made clerk of assize. For some reason, whether of private convenience, or conflicting public duty, he had asked and been allowed to be relieved, and to have his duty performed by a young gentleman, who attended in his place.

No objection was taken in the case at the assizes at any time for the want of an associate, but the Solicitor-General said the Government apprehended that the proceedings were illegal, and were willing to facilitate any proceeding at the instance of the defendant whereby they might be set aside or reversed, and he suggested that a writ *certiorari* might issue, and the proceedings be set aside on inspection of the record without the formality of a writ of error. He intimated, however, that the prisoner would be indicted and tried, or tried again upon the same indictment. The court took time to consider, the execution of the sentence being in the meantime respited. A writ of *certiorari* having been granted to remove the indictment and conviction, and a writ of *habeas corpus* to bring up the prisoner, and the prisoner being in court under the custody of the sheriff of Wentworth, the returns to the writs were read.

ROBINSON, C. J., after referring to *Rex v. Royce*, 4 Burr 2084-5; *Rex v. Clace*, Ib. 2458; *Rex v. Bithell*, 1 *Ld. Raym.* 48; *Rex v. Harris*, Ib. 267; *Regina v. Dixon*, 2 *Ld. Raym.* 971; *Rex v. Huggins*, 2 *Ld. Raym.* 1577, 1585; *Rex v. Farewell*, 2 *Str.* 1299; *Rev v. Athoe*, 1 *Str.* 553; 1 *Salk.* 144, 149, 150, 151; *Regina v. Potter*, 2 *Ld. Raym.* 37; *Rex v. Worsenholm et al.*, 12 *Mod.* 601; *Rex v. Fowler*, 4 *B. & Al.* 273; *Crepps v. Durden*, *Cowy*, 630; *Rex v. Bowman*, 6 *C. & P.* 101, 337; *Plow.* 390, 396; *Holt*, 132, 157; *Andrews*, 27; *Sayer*, 128; *Buls.* 101; *Ch. Crim. Law*, I. 372, 844, 756; 3 *Inst.* 231; *Hale P. C.*, Lib. 2, ch. 50, sec. 3; *Bl. Com.* IV., 391; 6 *Co.* 14 *a*; *Bac. Abr.* "Certiorari" A.; 14 & 16 *Ric.*, ch. 118; *Rex v. Tremaine*, 7 *D. & R.* 684; *Rex v. Ridgway*, 2 *B. & Al.* 527.

I think we may, according to the authorities which I have noticed, set aside upon motion proceedings which have taken place in an inferior criminal court, which were *coram non judice*, and clearly null and void. I apprehend it cannot even be necessary to set them aside, for if on a second trial of the same indictment, or on another indictment for this same felony, the defendant were to plead *autrefois convict*, the



record which he must produce in support of his plea, if it be truly made up, must shew that the former trial was *coram non judice*, and in fact no trial, and that the conviction and judgment was a nullity.

If for any purpose, in a collateral proceeding, an attainder or conviction were set up by a plea, and it appeared that the court before which the attainder was was illegally constituted, and not authorised to try the case, the court could even in that incidental manner, while the record remained otherwise unquestioned, determine the conviction and judgment to be void.

Then if so, though it may be unnecessary, it cannot be illegal to set aside such manifestly bad proceedings.

To proceed by writ of error would be the more formal method of getting rid of an erroneous judgment, but it does not appear to have been held necessary, but the contrary, and perhaps it would not in such a case as this be a proper course, because that is for error *in the judgment*, whereas here there is in fact nothing but a *void judgment*, no more a judgment than if the prisoner had been tried before any civil court having no jurisdiction in such a case.

Then, secondly, if we can legally set aside, is it the more safe and expedient course? That is rather for the consideration of the proper officer of the crown. We are to consider whether we can do what the Attorney-General asks us to do, and not to advise or direct as to ulterior proceedings. The Crown takes its course among those which are open to it.

Rex v. Fowler (4 B. & Al. 273) would seem to point to a *venire de novo* as a course to be taken in such a case, but the failure in the first trial was of a different nature from this.

The peculiarity of this case is, that the defendant does not move or object to the former proceedings; it is on the motion of the officer of the crown *against* the conviction.

I am not sure whether it would not have been better to have seen that the record was truly made up, exhibiting the mis-trial, and then leaving all as it stood to try again (perhaps on a new indictment), and let the prisoner plead *autrefois convict*, and put it so the court whether he had been (legally) convicted.

It should be recorded by the clerk of the court, in his minutes, that the defendant was brought up in custody of the sheriff of the county of Wentworth, and that the writs of *habeas corpus* and *certiorari* were brought before the court, and the returns thereto made : that the Hon. P. M. Vankoughnet, Queen's counsel, moved that, &c. (as in the motion papers) : that the prisoner was asked by the court whether he had any thing to say against the motion, or any thing to the court, and whether he desired to employ counsel : that he answered he had nothing to say ; that thereupon the prisoner was demanded in the custody of the sheriff of Wentworth, to be brought up again before this court on the morrow, at twelve o'clock.

Then enter the order of the court, upon motion of the Hon. P. M. Vankoughnet, counsel for the crown, that the verdict and judgment against the defendant in this case, and all proceedings subsequent to the indictment, be quashed and set aside, as illegal and void, and that the defendant be remanded to the custody of the sheriff of the county of Wentworth, to be committed to and detained in the common gaol of the said county until he be therefrom discharged by due course of law.

(Dated as of this day, and signed by the clerk of this court).

McLEAN, J., and BURNS, J., concurred.

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#### REGINA V. O'MEARA.

A mandamus will lie to compel a witness to prove the execution of a deed and memorial for registry.

*Becher*, Q. C., on behalf of John Ward, obtained a rule calling on John O'Meara to shew cause why a writ of mandamus should not issue, commanding him to prove for the purpose of registration, the execution of a deed of bargain and sale, dated 15th March, 1834, made by George Lee to the said John Ward, and conveying the south-west half of lot No. 20 in the third concession of Garrafraxa, in the county of Halton, and also the execution by the said Ward of the memorial thereof, which said deed and memorial are filed, and to both of which the said O'Meara is a subscribing

witness ; and also why the said O'Meara should not pay the costs of this application.

No cause was shewn.

ROBINSON, C. J., delivered the judgment of the court.

The statute 9 Vic., ch. 34, sec. 7, enacts, that every memorial of a deed shall be attested by two witnesses, one whereof to be one of the witnesses to the execution of the deed, "*which witness shall upon oath, before the registrar or his deputy, or before any judge of the Queen's Bench, or any judge of a district court, or any commissioner of the court of Queen's Bench in Upper Canada, prove the signing and sealing of such memorial, and the execution of the deed or conveyance mentioned in such memorial.*"

The question is, whether by these words a duty is thrown upon him by the statute which the court will compel him to perform, or whether the grantor should be left to any remedy by action against the party refusing.

No cause has been shewn against this rule, and we think the mandamus should go. The statute makes it the duty of the witness to prove the execution, and any remedy by action might fail to afford redress, and in many cases it undoubtedly would, from the non-age or circumstances of the witness.

It may, upon a fuller discussion, be found by us that we cannot grant the remedy desired, but under our present impression we will grant a mandamus, and especially as no cause has been shewn against the rule ; but we think we should not, even under these circumstances, grant a peremptory writ, because the defendant, if he has any excuse, should have every opportunity for shewing us that he cannot in conscience take the oath which we are desired to compel him to take.

Upon a mandamus *nisi* he will have it in his power to shew any reasons which he may have in law or fact against being compelled to prove the execution of the deed and memorial, and whatever those reasons are, they can then be formally adjudged upon.

Rule absolute for mandamus *nisi* (a).

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(a) On a return to the mandamus *nisi*, cause was shewn by the witness, which in the opinion of the court was sufficient, and they therefore refused a peremptory writ.

## EASTER TERM, 20 VICTORIA.

*Present:*

THE HON. SIR JOHN BEVERLEY ROBINSON, BART., C. J.

“ ARCHIBALD McLEAN, J.

“ ROBERT EASTON BURNS, J.

## CHISHOLM v. PROUDFOOT.

*Flour—Brand on barrels—Warranty—Evidence—Pleading*

Where a person manufacturing flour marks it as of a particular quality, that amounts to a warranty of its being of such quality.

*Held*, that in this case the evidence of representations made by the seller at the time of sale, were sufficient to warrant the jury in finding an express warranty.

When the declaration is framed in case, charging a false and deceitful warranty, knowing it to be untrue, the plaintiff may recover on proving the warranty only, without the *scienter*.

ACTION for breach of warranty on sale of flour.

*Bell*, for the plaintiff, cited *Bunnel v. Whitlaw*, 14 U. C. R. 241 ; *Jones v. Bright*, 5 Bing. 533 ; *Brown v. Edgington*, 2 M. & Gr. 279 ; *Powell v. Horton*, 2 Bing. N. C. 668 ; *Meyer v. Everth*, 4 Camp. 22.

*Jarvis* for defendant, cited *Haycraft v. Creasy*, 2 East, 92 ; *Pasley v. Freeman*, 3 T. R. 51 ; *Cornfoot v. Fowke*, 6 M. & W. 358 ; *Moens v. Heyworth*, 10 M. & W. 147 ; *Taylor v. Ashton*, 11 M. & W. 401 ; *Ormrod v. Huth*, 14 M. & W. 652 ; *Collins v. Evans*, 5 Q. B. 820 ; *Longmeid v. Holliday*, 6 Ex. 761 ; *Barley v. Walford*, 15 L. J. (Q. B.) 369 ; *Early v. Garrett*, 9 B. & C. 928 ; *Thom v. Bigland*, 8 Ex. 725 ; *Williamson v. Allison*, 2 East 446.

The facts and pleadings are fully stated in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

The defendant was the proprietor of mills called the Trafalgar Mills, in the township of Trafalgar, in Upper Canada, in which he had manufactured for many years large quantities of flour. The brand that was commonly



put upon the barrels at the mill, intended to denote the best quality of flour, was "Trafalgar Mills, Extra Superfine," which brand denotes the highest quality, according to the directions given in the Flour Inspection Act. The brand of these mills had a high reputation in the market, so that flour having defendant's brand upon it of "extra superfine" commanded the best price.

The plaintiff kept a store-house in Oakville, not far from defendant's mill, in which the defendant's flour was stored until it was shipped at that port.

In March, 1855, the plaintiff had bought about 500 barrels of flour from defendant, marked "Trafalgar Mills, Extra Superfine: J. Proudfoot."

The most of this was sent to New York, where it was inspected, and passed as of the highest quality. About that flour there was no question.

On the 9th of May, 1855, the plaintiff had in his warehouse, at Oakville, another 500 barrels of flour belonging to the defendant, made at the same mills, and having the same brand on the barrels. It had been sent to the warehouse by defendant at different times in and after the month of March. On that day, 9th of May, the plaintiff's brother went to the defendant, and proposed, on behalf of the plaintiff, to buy this flour. He asked defendant whether it was the same kind of flour as the other. Defendant said it was. It was marked "Trafalgar Mills, Extra Superfine," like the other lot. Upon that understanding, as he swore, he bought the flour for the plaintiff, at 50s. a barrel, being at that time the highest price there for flour of the best quality.

Messrs. Gooderham, Howland & Co., of Toronto, had advanced money to the defendant upon this lot of flour, and held the warehouse-receipts for it. It was necessary, therefore, for the defendant to communicate with them before he concluded the bargain. He did this on the 9th of May, before the bargain was made, asking them whether he should sell at ten dollars; and they answered in the affirmative, upon which the sale was made, and on the same day the plaintiff was informed of it.

The plaintiff, in consequence, on the next day (10th of

May), wrote to the defendant, "I will give you ten dollars per barrel for 500 barrels of flour now in store with me, payable in 20 days after date to Messrs. Gooderham, Howland & Co., Toronto," which was probably intended merely as a confirmation of what his brother had done on his account, or perhaps rather to specify how he proposed to make the payment, though it may have been that he considered that his brother had done nothing more hitherto than settle with the defendant the terms on which the flour could be had, and that this note was written by the plaintiff to signify his acceptance. The flour being in plaintiffs store, and piled up there by itself, the note seems to refer to that particular lot, which according to the note the plaintiff agreed to take ten dollars a barrel, without any thing said in the note of the quality, and without asking for any guarantee as to its passing inspection in Montreal or elsewhere.

On the 16th or 17th of May, the plaintiff sold this flour to Mr. Pridham, at an advance of 1s. 10½d. on each barrel, and Mr. Pridham intending to send the flour to Montreal to be sold there, exacted from the plaintiff a guarantee, such as is usual between merchants in that trade, that it should pass inspection at Montreal extra superfine.

The plaintiff thereupon sent a telegraph message to Messrs. Gooderham & Co., on the 17th of May, "Is Proudfoot's, Trafalgar Mills flour guaranteed extra, as branded?" To which they replied, "We don't know: you and he concluded the bargain."

The plaintiff did give to Pridham a written guarantee that the flour should pass inspection at Montreal as "*extra superfine*." Pridham sent down 435 barrels of it in June, which being inspected on the 16th of that month, none of it passed as "*extra superfine*," but of the grade next below, in consequence of which Pridham received 2s. 6d. on each barrel less than he would otherwise have done; and he sued the plaintiff on his written guarantee, and recovered.

The plaintiff, in consequence, brought this action against the defendant, relying upon an implied warranty arising from the brand which the defendant had put on the flour, and

relying also upon such evidence as he could give of an express warranty. Upon that point, besides what has been stated to have been sworn by the plaintiff's brother, there was the testimony of one Wright, which was less material from the circumstance that he was not precise as to time, and could not state expressly whether a conversation between the plaintiff and the defendant, which he stated he had heard in the plaintiff's office, occurred before or after the sale between them had been closed. According to his account it would seem to have taken place after the sale, for he said he had heard before he went there that the plaintiff had bought this flour; though it may be that the transaction had not yet been finally closed, and that the witness heard the sale spoken of, while the negotiation was pending. In the conversation he heard, as he stated, the plaintiff ask the defendant whether he was to understand that the flour was the best manufactured flour that his mill made: that the plaintiff replied that it was.

There was no other evidence to shew an express warranty of any kind between these parties.

With respect to what took place in Montreal the inspector was examined, and swore that the 435 barrels were all passed by him as "superfine," not as extra superfine. He stated that there was at that time no inspection in Upper Canada under the statute, no public inspection above Montreal: that flour would pass inspection in New York as extra superfine—that is, as of first quality—which would not pass inspection as such in Montreal, the standard at Montreal being higher: that the *Board of Trade in Montreal, from time to time, fix the standard*; and that flour would pass in New York in 1855 as extra superfine, that would not so pass in Montreal.

It was sworn, however, by the inspector, that he had inspected thousands of barrels of these mills, which stood inspection as branded.

On the part of the defendant it was sworn by the people employed in his mill, that this lot of flour was "extra superfine," made from the best fall wheat: that it was as good flour as had ever been branded at the Trafalgar Mills,

and deserved the mark which it bore: that it was as good as the other lot which the plaintiff had bought, and was made of the same lot of wheat.

No examination of the flour, after it was sent from the mill, was made in Upper Canada, either before or after the sale to the plaintiff.

Two members of the firm of Gooderham, Howland & Co., were examined upon the trial. They are large dealers in flour. They swore that according to the usage in the trade, if there is no express guarantee of quality given, the vendor is not liable: that the mill brand is looked upon as a guarantee that it shall pass inspection according to the mark, for that millers are known to be in the habit of marking their flour one grade higher (that is, I suppose, higher than the fact is), because standards of inspectors differ; by which we understand the witness to mean, that they mark it as high as they think it has any chance of passing. They stated further, that what is passed at Toronto as "fancy" flour, passes a grade higher at Boston: that the flour made at defendants' mills bears an excellent character: that it is not a common thing to guarantee quality of flour, without specifying some particular market or markets at which it shall pass inspection.

One of these witnesses swore, that in such transactions he should not value the miller's brand as any thing, for that they brand according to their fancy: that inspectors are appointed to fix the quality; and that on the plaintiff's letter of the 10th of May, produced, he should not say that the defendant could be taken as guaranteeing inspection at Montreal.

The plaintiff sued in *case*. His declaration contained five counts. In the first count he charged the defendant with fraudulently and deceitfully representing to him that the flour was "extra superfine," and inducing him by such fraudulent representation to buy it as such, when in truth the flour was not extra superfine, *as the defendant well knew*.

In the second count the plaintiff charged that defendant falsely, fraudulently, and deceitfully warranted that the flour was "Trafalgar Mills Extra Superfine" flour, and thereby induced the plaintiff to buy it; that the plaintiff



afterwards sold the flour to Pridham & Co., and warranted it to be "Trafalgar Mills Extra Superfine" flour, whereas in truth it was not so: that in consequence of this false and fraudulent representation of defendant, plaintiff was compelled to pay damages to Pridham & Co., and costs; and he complained that he was, by means of *the said false, fraudulent, and deceitful warranty of the defendant*, greatly damnified, &c. In this count the plaintiff does not expressly aver a knowledge by defendant that his alleged warranty or representation was false.

In the third count the plaintiff charged, as in the second, that the defendant fraudulently and deceitfully warranted the flour to be Trafalgar Mills Extra Superfine Flour, and thereby induced the plaintiff to buy, and that defendant thereby falsely and fraudulently deceived the plaintiff in the sale of the flour; and the damage to which plaintiff was put in consequence of his having warranted the flour to Pridham & Co., was stated as in the second count. There was not in this count any express averment that the defendant knew the flour not to be "Trafalgar Mills Extra Superfine."

In the fourth count the plaintiff avers that he was a dealer in flour, and desired to purchase 500 barrels of "Trafalgar Mill Extra Superfine Flour:" that the defendant was the manufacturer of the said description of flour, and was then possessed of 500 barrels of flour before then manufactured by him, which was marked and branded by the defendant with the mark, "Trafalgar Mills, Extra Superfine," and that the plaintiff desired to buy the same as such flour, of which the defendant had notice: that defendant, knowing this, and being the manufacturer of the flour, and having *falsely, fraudulently, and deceitfully marked the said flour as, &c.*, (repeating the mark) induced the plaintiff thereby to buy the same, as being in every respect proper to be re-sold as "Trafalgar Mills Extra Superfine" flour: that the flour, at the time of such sale, was not such flour as it was warranted to be and marked, but was of a very inferior description, *of all which the defendant, at the time of the sale, had knowledge and notice*; and the plaintiff sets out, as in the former counts, the damage he was made to suffer in consequence

of his re-selling the same to Pridham & Co., with a warranty that it was "Trafalgar Mills Extra Superfine" flour.

In the fifth and last count it was stated that the plaintiff, then being a maker and manufactrer of flour, at the Tarfalgar Mills, falsely, fraudulently, and deceitfully in 'ending to injure the plaintiff, packed up at his mills 500 barrels of flour, and falsely, fraudulently, and deceitfully branded the same as "Trafalgar Mills Extra Superfine" flour, and afterwards to wit, on, &c., falsely, fraudulently, and deceitfully sold and delivered the flour to the plaintiff, as "Trafalgar Mills Extra Superfine" flour, and then falsely and fraudulently represented to the plaintiff that the flour was correctly marked and branded according to its quality, when in truth it was not "Trafalgar Mills Extra Superfine" flour, but was of an inferior description, *which the defendant well knew*—laying the special damage resulting from it as before.

The defendant pleaded—1st. Not guilty; and to each count, that the flour sold to the plaintiff was "Trafalgar Mills Extra Superfine" flour.

Upon the trial of these issues, when the plaintiff's evidence was closed, the defendant moved for a nonsuit, contending—1st, that there was no proof of guilty knowledge on the part of the defendant, and that without that this action must wholly fail. 2nd, that there was no proof that the flour was not what it was branded for, namely, "Trafalgar Mills Extra Superfine."

Leave was reserved to the defendant to move afterwards for a nonsuit on those grounds; and at the close of the case the learned judge left it to the jury to find whether there was any express warranty by the defendant that the flour was extra superfine; and if so, did it answer the warranty?

He observed that it was no doubt branded on the barrels as being of that quality, but that, without other evidence, he did not think that would make the defendant liable as on an express warranty, especially after reading the plaintiff's letter to Messrs. Cooderham & Co., written several days after the sale, enquiring of them whether the flour was guaranteed extra superfine, as branded. He did not consider that the defendant having manufactured the article could be

taken as having impliedly warranted it to be of the quality marked upon it, though he might be held to have warranted that it was reasonably fit for the purpose for which it was sold, especially as it was sworn that flour will pass as of a higher grade in one market than it will in another, and there was no warranty by defendant shewing that the flour should pass inspection at Montreal as extra superfine.

The jury, however, found for the plaintiff, damages £50; and the defendant has obtained a rule to shew cause why a nonsuit should not be entered upon the leave reserved, or why there should not be a new trial, without costs, on the ground that no *scienter* was proved, and no such warranty or representation as is stated in the declaration, and that the flour was proved to be such in truth as was described in the brand; and that the jury ought to have been asked to find whether there was any such warranty or representation as stated in any of the counts of the declaration, and if so, whether such warranty or representation was false to the knowledge of the defendant, and whether the plaintiff bought in consequence of such false warranty or representation.

I have been particular in stating the pleadings and evidence because the question presented in such cases are so important to persons engaged in this branch of trade that the ground on which we decide them ought to be clearly understood.

The case altogether turns upon the question, whether there was either such evidence as well supported the finding of the jury upon the ground of an express warranty, or whether, from the circumstances and nature of the transaction, a warranty should be implied.

In either case the defendant would not be entitled to succeed on his motion for nonsuit, upon the objection taken at the trial; namely, that it was necessary to satisfy the jury that the defendant's conduct was fraudulent and deceitful, and that he either knew the flour to be of an inferior quality, or had no sufficient reason to assume that it was of the description of flour for which it was sold. The cases of *Williamson v. Allison* (2 East 446); *Jones v. Bright* (5 Bing.

533); *Brown v. Edgington* (2 M. & Gr. 279); and of *Allan v. Lake* (18 Q. B. 560) shew that, although the action may be framed in case, as this is, and although the defendant may have been charged with falsely and deceitfully warranting, and with knowing that the article which he sold was not such as he warranted it to be, yet that the plaintiff can upon such a declaration recover upon the warranty alone, if his evidence establishes a warranty either express or implied, for that in such cases a *scienter* need not have been averred, and though averred need not be proved. In *Thom v. Bigland* (8 Ex. 725) the distinction in this respect is shewn between cases grounded on an alleged warranty, and cases where the action is independent of any warranty, and is grounded wholly upon a complaint of some deceitful representation, by which the plaintiff has been injured.

Then can it be said that the jury has done wrong in finding a warranty? In the argument the case in this court of *Bunnel v. Whitlaw* (14 U. C. R. 241) was referred to. It has much resemblance to the present, and perhaps cannot be clearly distinguished from it, though there was evidence in that case of particular representations made by the vendor, of the flour being such as would pass inspection at a particular market for which it was known to be destined.

But from the great importance of the question, we have thought it right not to satisfy ourselves with resting on that decision, or upon the judgment which was given in it upon the question of implied warranty, where the person selling the article is the person who manufactured it. Upon a review of the authorities we have come to the conclusion that in this case, independently of the brand upon the barrels, there was evidence given to the jury which, if believed, would warrant them in finding an express warranty, upon the principle that representations made by the vendor at the time of the sale, or during the negotiation, may be treated as an express warranty, if it appears reasonable on a view of the circumstances to understand the representations as being so intended, although the very word "warrant" may not have been used, or any word of equivalent force implying an express engagement; and we think also that



the defendant, who manufactured the flour, having marked it extra superfine, that amounted to a warranty of its being of that quality, for he must be taken to know what kind of flour deserved to be so branded, and had the means of knowing, through his servants who prepared and marked it, whether the flour in question was really of that quality or not.

Besides many other cases which might be referred to, we think those we have already mentioned, of *Jones v. Bright*; *Brown v. Edgington*; *Allan v. Lake*; and of *Wieler v. Schilizzi* (17 C. B. 619) fully support what the plaintiff in this case contends for.

Then we must in this case look upon the defendant as having warranted the flour to be "extra superfine," the next question is, was a breach of that warranty proved? We assume that we must take the words "extra superfine," not merely to mean such flour of the Trafalgar Mills as the defendant was in the habit of designating by that brand, but that they were intended to denote that the flour was of that quality, according to the proper standard in the trade; we mean of course in Canada, for there was no warranty given or asked for here that the flour should stand inspection in any particular market abroad.

If the defendant could have shewn that the flour had been inspected here, and passed as extra superfine, but had afterwards been rejected or passed only as of an inferior quality in Montreal, we do not by any means say that the defendant would have been liable as for a breach of his implied warranty, because it failed to pass a second inspection; but here the only legal proof we have as to its coming up to or falling short of the quality for which it was branded, is in the fact that being inspected by a proper public officer in this Province, within a few days of the sale, it was found by him not to answer the brand. We must take that to be decisive, we think, as between vendor and vendee, when it is unexplained by any thing but the testimony of the defendant's own servants, very honestly given, we have no doubt, that in their opinion of their flour deserved the brand they put upon it, and was as good as their mill had ever turned out. If we were to hold otherwise on this point, there would be

little use in the inspection law. Upon these grounds we think the rule must be discharged.

BURNS, J., referred to the cases reported in 17 C. B. 619, and 18 Q. B. 560, as particularly applicable to this case.

McLEAN, J., concurred.

Rule discharged.

### BRUNSKILL V. MAIR.

*Flour—Action for not accepting—Dry of delivery falling on Sunday—Alteration of notice—Measure of damages—Amendment.*

Defendant agreed to purchase from plaintiff 2,000 barrels of flour, to be delivered at a good port on Lake Ontario *in all June next*, by giving the buyer one week's notice at Toronto, at 37s. 6d. per barrel, payable on delivery. Plaintiff sued for non-acceptance, averring that he was ready and willing, and offered to deliver the flour at Oswego, but defendant refused to accept, and he was consequently obliged to re-sell at a loss.

Defendant pleaded that the plaintiff gave one week's notice of delivery to him at Oswego on the 1st of June: that he was ready and willing to accept and pay for the flour there on said 1st of June, *and for a reasonable time thereafter*, but that the plaintiff had not the flour on that day, *nor at any time within a reasonable time thereafter*. It appeared that the plaintiff had given notice of delivery on the 1st of June, but afterwards, on the 31st of May, finding that the 1st would fall upon a Sunday, he notified defendant not to attend then, but on the 11th instead; and that he had attended both on the 2nd and 11th, and was ready to deliver, but defendant was not there to accept.

*Held*, that the plaintiff was entitled to recover, and that the measure of damages was the difference between the contract price and what he was afterwards obliged to sell at Oswego.

At the trial the Chief Justice refused to allow defendant to add a plea, setting up as a defence, that by departing from the first notice plaintiff had put an end to the contract.

The plaintiff sued on an agreement between him and defendant, made on the 31st of October, 1855, that the plaintiff should sell and deliver to defendant 2000 barrels of No. 1 superfine flour, on the following terms:—The said flour to be delivered at a good shipping port on Lake Ontario, including Oswego and St. Catharines, *in all June next*, by giving the buyer one week's notice at the office of R. A. Goodenough, Toronto, at the price of £1 17s. 6d. for each barrel free of charges, and in shipping order, and inspection warranted; cash to be paid on delivery; and the plaintiff averred that defendant agreed to accept and pay for said flour according to the terms of the said agreement, and that within the time in the agreement mentioned he was ready and willing, and offered to deliver the flour to defendant, and did all things necessary

on his part to entitle him to have the same accepted and paid for by the defendant at Oswego on the terms aforesaid, yet that the defendant would not accept and pay for the flour, in consequence of which he was obliged to re-sell the same at a great loss.

The plaintiff pleaded that after the making of the agreement he gave one week's notice to the defendant that the flour would be delivered to him at Oswego on the first day of the month of June following: that he was ready and willing to accept the flour, and pay for the same at Oswego, *on the said first day of June, and for a reasonable time thereafter*, but that the plaintiff had not the said flour at Oswego on the day mentioned in the said notice, *nor at any time within a reasonable time thereafter*. The defendant joined issue on that plea.

At the trial at Toronto, before *Robinson*, C. J., and a special jury, it was proposed that on the 31st of May, 1856, the plaintiff wrote to the defendant as follows:

"I hereby notify you that the notice given you, and bearing date the 14th May instant, for the delivery of 2,000 barrels No. 1 superfine flour at Oswego, on the first day of June next, in pursuance of the sale made to you on the 31st of October last, is hereby waived, and you need not attend on that day to receive the same, as the first day of June falls on Sunday, and you cannot be legally called upon to accept a delivery of the said flour on that day; and I now notify you that I shall attend at the office of Clemow & Bloor, in the said city of Oswego, for the purpose of delivering the said flour to you, on Wednesday, the 11th of June now next ensuing."

The plaintiff proved by Mr. Goodenough, at the trial, the broker referred to in the agreement, by whose agency the contract was made, that on Monday, the 2nd of June, he went to Oswego, at the request of the plaintiff, to deliver 2,000 barrels of flour which the plaintiff had purchased, and had in store to be delivered to the defendant upon the contract: that it was of the stipulated quality, and had cost the plaintiff £3,500, besides charges: that he went on that day so as to be prepared to deliver the flour in case the defendant should

attend, notwithstanding the notice which had been given to him naming the 11th of June: that he had the transfer receipt for the flour, and an order on the parties at Oswego who held it in store; and that if defendant had been there to receive and pay for the flour he would have got it.

This witness also swore that he went again by the plaintiff's desire to Oswego on the 11th of June, to make a delivery of the flour to defendant, if he should attend upon the second notice; that the flour was still there in store, but upon all the inquiry he could make he could see or hear nothing of the defendant.

The plaintiff's broker swore that he went also to Oswego on behalf of the plaintiff to attend to the delivery of the flour, and attended there on the 2nd of June from 7 a.m. to 8 p.m., but though he had registered his own name and address at the different hotels, he could hear nothing of the defendant; that he went again on the 10th of June, and staid over the 11th, for the same purpose, but could not see or hear any thing of the defendant.

Both witnesses proved that they went to the office of Clemow & Bloor, mentioned in the plaintiff's notice.

The plaintiff proved also, that a few days afterwards he sold 1000 barrels of the flour at Oswego for 23s. a barrel, which the plaintiff had purchased at 42s. 6d.; the other 1000 barrels were sold at 22s. 6d.

In the course of the trial the defendant applied to be allowed to place another plea on the record, setting up as defence that the plaintiff, by giving the first notice for the 1st of June, fixed that day for delivery, and that when he subsequently departed from that day, and named the 11th of June in a second notice, he thereby put an end to the contract altogether, and disabled himself from suing. The amendment was opposed. It was asserted that the trial of this suit, which was brought in September, 1856, had been twice put off at the defendant's instance. It appeared to the learned Chief Justice that the defendant had therefore had ample opportunity to consider and prepare his defence, and that it would not be an advancement of justice to allow him to put in a plea setting up a new defence in the middle of the trial, especially a defence which, if it could avail,



would not be a just one, since by the agreement the plaintiff had the whole month of June to deliver the flour in, and was prepared on both days, as his witnesses proved, having only recalled his first notice because he had accidentally named Sunday, when the business could not have been transacted, and having re-named another day within a reasonable time after the first.

The defendant endeavoured to prove that the 1000 barrels of flour were not of as good quality as the contract required, and also that the flour could have been sold by the plaintiff at and after the days named, for higher prices than were obtained.

The evidence on both grounds was submitted to the jury.

The learned Chief Justice repeated, at the conclusion of the case, the reasons which induced him to decline allowing the amendment, especially after the defendant had treated the contract as being still in force, by pleading that he attended on the first day of June named in the first notice, and *for a reasonable time thereafter*, but that the plaintiff had not the flour then ready, *nor at a reasonable time afterwards*. He thought it would not be just to allow the defendant after this to set up as a defence that he had a right to treat the contract as cancelled, and so was under no obligation to attend at any time. He remarked that, according to the evidence, flour had fallen greatly in price between the making of the contract and the month of June, and the defendant had shewn no disposition to abide by his agreement, though he pleaded that he was ready to accept.

He told the jury that upon the issue joined the question was whether the defendant did attend on the 1st of June to receive the flour, or at any reasonable time afterwards, as he asserted he did. If on this issue he had shewn that he attended on the second day named (the 11th of June) the plaintiff could not have disputed that that was within a reasonable time, because he had himself appointed that day by his second notice. If the defendant had gone on that day, and had not found the plaintiff ready to deliver, the plaintiff could not have resisted an action for the failure on his part.

The defendant had attempted, by cross-examination of the

plaintiff's witnesses, to prove that as to some if not all of the 2,000 barrels lying at Oswego, the plaintiff had not in fact conclusively bought it, but by some provisional arrangement with a third party was merely making a shew of having it ready, in order to build up a claim for damages. His evidence did not seem by any means to establish that; but the learned Chief Justice told the jury, that unless they were satisfied that the plaintiff had really provided the flour, and had it ready—that is, the full number of barrels—he would not be entitled to their verdict, for the contract would not have been satisfied by a tender of part; and that before they could give the plaintiff such damages as he claimed, they must be satisfied that he had the 2,000 barrels of flour ready, such as was specified in the contract, and that it was left on his hands by the defendant's failure to accept and pay for it, and remained his, subjecting him afterwards to the loss or re-sale, which he complained of as the damage he had sustained.

The jury found for the plaintiff, and £1,457 10s. damages.

*McMichael* obtained a rule *nisi* for a new trial, on the law and evidence, for misdirection and for excessive damages, and because the defendant was not allowed to amend his pleadings at the trial; or for a new trial on affidavits, with leave to amend his pleadings.

*Boomer* shewed cause, and cited *Lucas v. Beal*, 10 C. B. 739; *Doe dem. Poole v. Errington*, 3 N. & M. 646; *Jenkins v. Phillips*, 9 C. & P. 766.

*M. C. Cameron* supported the rule, citing *Stead v. Dawber*, 10 A. & E. 57.

ROBINSON, C. J.—The case cited by Mr. Cameron, of *Stead v. Dawber et al.* (10 A. & E. 57), does not apply, because there the plaintiff was suing for non-delivery on a day which was not within the contract, but which was a day afterwards agreed upon verbally by the parties, in consequence of the day which had been inserted in the writing falling upon a Sunday.

There the court held there was no contract binding, under the Statute of Frauds, and obviously that was the consequence

of departing in that case from the time set out in the written agreement. In the case before us, however, it cannot be said that the plaintiff is suing the defendant for not accepting flour which he had ready only at a time outside of the written contract, because by the written contract the plaintiff had *the whole month of June* in which to deliver the flour ; but then it is true he was bound to give notice of some day within the month in which the defendant was to accept the flour and pay the price. He did give notice for the 1st of June, and the defendant admitted such notice to stand good for that day, and *for a reasonable time afterwards*, as he states in his plea, setting up as his defence that he was present on that day at Oswego to receive and pay for the flour, but that the plaintiff had not the flour, either at that day *nor at any time within a reasonable time afterwards*. Whether he had or not was the only question to be tried on that issue ; and it was proved, as the jury found, and as I think the fact was, that the plaintiff had the flour actually then there, and for a reasonable time afterwards.

The defendant, as if acquiescing in the propriety of not taking the 11th of June strictly as the day (Sunday not being a day on which such business should be transacted) denied that the plaintiff was ready, either on that day *or in a reasonable time afterwards*. The 11th of June was a reasonable time afterwards, being within the month limited by the written contract, and the defendant being duly notified to attend on that day. The fact was, as I think the evidence must have satisfied the jury, that the defendant had not attended either on the one day or the other.

As to the objection that the damages should have been the difference in price at Toronto, and not at Oswego, I think there is no force in it, for by the express terms of the contract the plaintiff was at liberty to deliver the flour at Oswego, and the defendant was bound to accept it at any port of delivery within the contract. The question is what was the price at Oswego at the time when the defendant ought to have received it there, and how much did it fall short of what the plaintiff would have received there, if the agreement had been fulfilled on the defendant's part.

By the plaintiff's notice, served in time on the defendant, Oswego was made the port of delivery, and Toronto had nothing more to do with the contract after that than any other port.

The evidence as to prices in June was contradictory, but perhaps not so much so as it seems, when it is considered that the witnesses who spoke of prices at Toronto, spoke of flour made from Upper Canadian wheat only, and not from western wheat generally, between which and Canadian there was proved to be a considerable difference in the market. Witnesses of apparent respectability, and of experience in the trade, appeared to me to give such evidence as supports what the jury found to be the damage.

I think we must discharge the rule.

BURNS, J.—I see no reason to disturb the verdict rendered in this case. The contract was, that the flour might be tendered to the defendant in all the month of June, 1856, at a good port on Lake Ontario, including Oswego and St. Catharines, on the seller giving the buyer one week's notice. It so happened that the first day of June, 1856, came upon Sunday; but without noticing that fact, the seller, on the 10th of May, 1856, gave notice that he "should be ready to deliver the flour at Oswego on the 1st of June." Part of the contract was that the buyer should pay the price on the delivery of the flour. Now had the plaintiff, it may be asked, any legal right to exact the attendance of the defendant to complete the fulfilment of the contract upon a Sunday? The plaintiff had a right to choose any day he pleased in the month of June, upon giving a week's notice, but in doing so, could he select a day upon which the defendant was not legally bound to attend? I am of opinion he could not do so. One way to test that point would be to put this case—suppose the plaintiff had given no other notice than that of his readiness to deliver on the first day of June, being Sunday, and the plaintiff had, after the expiration of the month, sued for the non-delivery of the flour, could he have maintained the action? I think he might have done so. It surely could not lie in the mouth of the seller



to say that he could absolve himself from the contract by naming a Sunday upon which to complete it; and it would be contrary to all the rules of business that he should have it in his power to name Sunday for the completion of the contract, and compel the buyer to attend on that day, when it might be expected there would neither be storehouses open to receive it, nor labourers who could properly be employed to remove or take charge of it. The case of *Stead v. Dawber* (10 A. & E. 57) by no means determines that Sunday may be selected as a day upon which to complete a contract. In that case the last day named happened upon a Sunday, but the contract might have been performed upon that day. The question in that case was whether the agreement for a new day after that time to complete the contract was not another contract, and not a dispensation merely of the performance on a particular day. In the case before us the plaintiff had the whole month of June to signify his readiness to deliver the flour in, and as I understand the contract, he could not have offered it sooner than the 1st of June; and if he had delayed till after the month had expired he would have broken his contract. If both parties had agreed upon a particular day on which the contract was to be completed, and it so happened that such day would have fallen upon a Sunday, then the question would be whether either party was bound thereby; but the plaintiff here had the option to select a day in the month of June, and the question is, whether having selected Sunday, he could compel the defendant's attendance on that day—See *Bloxsome v. Williams* (3 B. & C. 232), *Fennell v. Ridler* (5 B. & C. 405), *Smith v. Sparrow* (4 Bing. 84) *Williams v. Paul* (6 Bing. 653), *Simpson v. Nicholls* (3 M. & W. 240), *Beaumont v. Brengeri* (5 C. B. 301).

If the plaintiff had no legal right to compel the attendance of the defendant upon a Sunday to receive the flour, then could he name another day, after having named an illegal one, within the time during which he had to perform his contract? I think he might do so, and if he had not done so he would, after the expiration of the month, have been liable for the non-delivery of the flour.

The verdict, therefore, is not contrary to law or evidence; and upon proof of a day named in June, which was a legal and proper day for the transaction of business, after the Sunday first named, there was no misdirection of the learned Chief Justice. When we look at the issue taken by the defendant's plea to the breach of the contract stated in the declaration, it is apparent the defendant did not suppose the plaintiff had bound himself particularly to complete the contract upon the 1st of June; for the plea asserts that the defendant was ready and willing to accept the flour on the 1st of June, and for a reasonable time thereafter, but the plaintiff failed in having the flour at Oswego on the day named, or for a reasonable time afterwards. It would not have been just to the plaintiff to allow the defendant to set up a technical defence after such a plea; and besides, as I view the case, the technical defence could not have availed the defendant. As to the ground of excessive damages, evidence was given to the jury of the quality of the flour; and being a special jury, and well qualified to decide the matter between the parties, I see no reason to interfere.

MCLEAN, J., concurred.

Rule discharged.

## RENALDS V. OFFITT.

### *Landlord and tenant—Estoppel—Pleading.*

*Declaration*, that the plaintiff let to the defendant a certain tenement, to be used by him as a dwelling house, for certain rent, whereby it became his duty not to remove or despoil the same, yet defendant did remove the house, which thereby became wholly lost to the plaintiff; and for that defendant converted to his own use certain goods and chattels, to wit, a building and the materials of which it was composed.

*Plea*, that the building was situate on defendant's land, and encumbered the same, wherefore defendant gave due notice to the plaintiff to remove it, and because it was not removed in a reasonable time defendant removed it, doing as little damage as possible.

*Held*, on demurrer, plea bad; for defendant having accepted a lease of the house, which would carry with it the land on which it stood, he was estopped from thus denying his landlord's title.

*Declaration*—That the plaintiff let to the defendant a certain tenement of the plaintiff's situate in the village of Windsor, in the county of Elgin, consisting of a frame building, to be used by the defendant as and for a dwelling house and grocery store, for certain rent to be paid by the

defendant to the plaintiff in that behalf, by reason whereof it became and was the duty of the defendant not to remove or wilfully despoil the said tenement, or to convert the same to any use inconsistent with the letting thereof by the plaintiff to the defendant as aforesaid ; yet the defendant, after he had entered into and was in possession of the said tenement, did despoil the same, and remove it from the site whereon the said tenement was when so let by the plaintiff to the defendant ; and the said tenement has, by the defendant's conduct in the premises, been wholly lost to the plaintiff : and for that the defendant converted to his own use, and deprived the plaintiff of the use, possession, and benefit of the plaintiff's goods and chattels—that is to say, a certain building or house of the plaintiff, and the materials whereof the same was composed ; and the plaintiff claims forty pounds.

*Plea*—That the said building was, at the time of such removal, situate on the land of the defendant, and encumbered the same ; whereof the defendant gave due notice to the plaintiff requiring the removal of the same, and because the same was not removed within a reasonable time after such notice, the defendant removed the same, doing as little damage thereto as possible ; and that this, and no other, is the grievance complained of in both counts of the declaration.

*Demurrer*—That the defendant does not shew that his tenancy of the building had ended before he gave notice and removed the building ; as in that plea alleged : that the defendant while holding the said building as tenant under the plaintiff, could not treat the same as a nuisance on his land : that he is estopped from alleging that the land whereon the said building was situate at the said time was the defendant's, because the plaintiff's right to the building (which the defendant acknowledged by taking from the plaintiff, as alleged in the first count of the declaration) implied also a right in the plaintiff to the land whereon the said building was situate, &c. : that the said plea gives no colour, and that it does not give a logical or legal answer to the declaration ; that the matter complained of in the declaration is a total conversion of the building, and the material thereof, to

the defendant's use and not a mere removal: that the said plea assumes a right in the defendant to remove the said building at any time after having given notice to the plaintiff, his landlord, without shewing that his tenancy thereof under the plaintiff had ceased, or that the plaintiff's right thereto had ceased; nor does the said plea shew how or when the defendant became owner of the said land, nor that the plaintiff had no right to nor interest in the said land; and that the said plea sets up a defence contrary to the laws relating to landlord and tenant.

*O'Connor*, for the demurrer, cited *Parry v. House*, Holt, N. P. C. 489; *Alchorne v. Gomme*, 2 Bing. 54; *Fleming v. Gooding*, 10 Bing. 549; *Doe dem. Bullen v. Mills*, 2 A. & E. 17; *Doe dem. Miller v. Tiffany*, 5 U. C. R. 79; *Denholm v. The Commercial Bank*, 1 U. C. R. 367; *Oates v. Cameron*, 7 U. C. R. 228.

*Prince contra.*

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the defendant's plea is bad, for it professes to answer both counts of the declaration, and it certainly is not a good answer to the first count.

When the defendant took from the plaintiff a lease of the dwelling house, as is alleged in the declaration and not denied by the plea, he must be taken to have admitted the right of the plaintiff to lease it to him as it stood, and he could not turn round upon him and say, "It stands wholly or partly on my land, and therefore I will pull it down and remove it."

If the law would admit of a tenant acting in that manner, a door would be open to great abuse and hardship in case of disputed boundaries, for a tenant might give no intimation of any claim to the land on which the house stands, until he had by such contrivance got into possession, and then might set to work to remove it.

The demise of the house would always, from necessity, carry with it the land on which it stands, and if the tenant took the lease of the dwelling in the ordinary manner, which for all that appears he did, he acquiesced in the right of the landlord to lease it to him.



The facts might be such as to shew that the building was let, not as real property, but as a carriage might be let, being moveable in its character—as for instance a booth or shop on wheels, such as we see at a fair—and in that case it might be well understood that it was rented as a mere chattel, without regard to locality; but we do not see such a case stated in the first count, or brought out in the plea; and as the plea is an insufficient answer to the first count, to which it professes to be an answer as well as the second count, judgment must be for the plaintiff, unless the defendant desires to amend in a month, paying costs.

Judgment for plaintiff.

#### GRIMSHAW V. THE GRAND TRUNK RAILWAY CO. OF CANADA.

14 & 15 Vic., ch. 51, sec. 11, subsec. 16—*Arbitration—Notice of desistment.*

Under the 14th & 15th Vic., ch. 51, sec. 11, subsec. 16, a notice for lands, may be desisted from, and new notice given for the same lands, even after the arbitrators named in the first notice have met, and are engaged in the arbitration; and an award made by them after such notice of desistment is void.

*Quere*, whether the arbitration under the second notice can also be desisted from, or whether the power extends only to the arbitrators first appointed.

*Per McLean, J.*—The award made by the first arbitrators was also bad in this case, for under subsec. 15, an award cannot be made by two arbitrators, when the third refuses to act.

This was a special case.

*Declaration*—That the plaintiff and defendants entered into an arbitration, to ascertain the value of certain lands situate in the township of Hamilton, in the county of Northumberland, the property of the plaintiff, and taken by the defendants for the purposes of the said railway company, and to ascertain the damages sustained by the plaintiff in consequence of the defendants taking the said land as aforesaid, according to the statute in such case made and provided: that one Thomas Eyre was appointed by the said defendants as the arbitrator on behalf of the said defendants, to carry out the arbitration above referred to, and as such to act in pursuance of the Railway Clauses' Consolidation Act; and that the plaintiff appointed one John Montgomery Campbell as arbitrator, to act on behalf of the said plaintiff, in conjunction with the said Thomas Eyre for the purposes aforesaid: that the said Thomas Eyre and the said John Montgomery Campbell, being so appointed for the purposes

aforesaid, thereupon appointed one John Shuter Smith as the third arbitrator, in pursuance of and under the provisions of the Railway Clauses Consolidation Act before referred to : that the said three arbitrators were duly sworn before one of Her Majesty's justices of the peace in and for the united counties of Northumberland and Durham, and took upon themselves the burthen of the said arbitration : that the said John Montgomery Campbell and the said John Shuter Smith, being a majority of the said arbitrators so appointed as aforesaid, afterwards, to wit, on the 9th of July, 1856, made their award in writing, and assessed the value of the land above-mentioned and referred to as being taken possession of by the said Grand Trunk Railway Company of Canada, for the purposes aforesaid, and the damages of the said Thomas Grimshawe in consequence of the said land being so taken, at the sum of £3116 5s. 9d., and that the said Thomas Grimshawe should give a conveyance in fee simple of the said land to the said Grand Trunk Railway Company of Canada, whenever they should demand the same. And the plaintiff further avers that he has always been ready and willing to perform his, the said plaintiff's, part of the said award, but the defendants have hitherto wholly refused and neglected to perform their (the said defendants') part of the said award.

*Plea*—That the lands mentioned in the declaration as taken by the defendants, were taken by them for the purposes of the Grand Trunk Railway, as in the declaration mentioned, under the provisions of the Railway Clauses Consolidation Act ; and the defendants say that the powers and authority of the defendants to take such lands are regulated and conferred by the said Railway Clauses Consolidation Act, which enacts how the conveyance of the lands, their valuation, and the compensation therefor, shall be made : that acting in pursuance of the provisions of the said act, they (the defendants) caused a notice to be served on the plaintiff, containing a description of the lands of the plaintiff required for the purposes of their railway, describing the lands of the plaintiff so required to be taken, and stating that the said company were willing to pay in accordance with the provisions of the said act, the sum of £433 5s., as compensation for the fee

simple of the said piece of land, and damages sustained in consequence of the said railway, and the name of a person to be appointed as the arbitrator of the defendants, if their offer was not accepted, which said notice was accompanied by the certificate of John K. Roche, he, the said John K. Roche, being then a sworn surveyor for Upper Canada, and being disinterested in the matter, and not being the arbitrator named in the notice, that the land in the notice described is shewn on the map or plan of the railway of the defendants, and that the said piece of land was required for the railway of the defendants, and that he, the said John K. Roche, knew the land in the said notice described, and that the sum offered by the defendants was in his opinion a fair compensation for the said land, and for all damages occasioned by construction of said railway of the defendants; and the defendants aver that the person so named by them as the arbitrator who would be appointed by them, was the said Thomas Eyre in the declaration mentioned: that the plaintiff in pursuance of the said notice, notified the defendants that he refused to accept the said sum of money mentioned as compensation in the aforesaid notice, and that he had appointed John Montgomery Campbell in the declaration mentioned as his arbitrator, pursuant to the provisions of the said Railway Clauses Consolidation Act: that the reference to arbitration in the declaration mentioned was made in the manner and by the notices hereinbefore in this plea mentioned, and not otherwise, and was so made under the provisions of the said act: that in pursuance of the provisions of the said act, the said Thomas Eyre and John Montgomery Campbell appointed the said John Shuter Smith as the third arbitrator, as in the declaration is mentioned: that before the said arbitrators, or any two of them, made any award, they, the defendants, in pursuance of the provisions of the said act, gave notice to the plaintiff that they, the defendants, desisted from the notice for lands hereinbefore mentioned, and under which the said Thomas Eyre, John Montgomery Campbell, and John Shuter Smith had been nominated and appointed arbitrators as hereinbefore mentioned; and the defendants say that they desisted from all proceedings under the said firstly

mentioned notice, and that the said John Montgomery Campbell and John Shuter Smith, after the defendants had given notice to the plaintiff that they had desisted from the said notice for lands, proceeded with the said reference, and made the said pretended award in the declaration mentioned.

CASE.

This is an action brought by the plaintiff against the defendants for the recovery of £3,116 5s. 9d., which sum was awarded to the plaintiff upon a reference pursuant to the Railway Clauses Consolidation Act, in manner and form as set forth in the foregoing declaration and plea (which is referred to as part of the statement of this cause), and by the consent of the parties, and by the order of the Honourable Sir John Beverley Robinson, Baronet, Chief Justice of our Court of Queen's Bench, dated the 29th of May, 1867, according to the Common Law Procedure Act, 1856, the following case has been stated for the opinion of the court, without any pleading, the foregoing declaration and pleading being referred to only as containing a brief statement of the case, which is more fully set out hereafter.

The plaintiff was seised in fee of certain lands in the township of Hamilton, in the county of Northumberland, being parts of lots Nos. 3, 4 and 5, in concession B; and the defendants laid out their railway over and across the same, and occupied a portion of the same, containing seven acres and twenty-nine hundredths of an acre of meadow land, and served the notice firstly in the foregoing plea mentioned on the plaintiff, as stated in the said plea (which is incorporated herewith as part of the statement of this case), said notice having been so served on the 14th day of March, 1856.

And they, the defendants, immediately thereafter took possession of the land mentioned therein, and enclosed and fenced the same, and made their railway thereon, long before the said award was made, and long before the service of the said notice by them, the defendants of their intention to desist from their said first notice; and the defendants have continued ever since to possess and use the said land for their said railway.

That the notice so served on the 14th day of March was in the words and figures following, that we say:

"Notice.—To Thomas Grimshawe, of the township of Hamilton, in the county of Northumberland, Esquire. Take notice, that the Grand Trunk Railway Company of Canada require, for the purpose of their railway, that



portion of lots numbers three, four and five in concession B, in the township of Hamilton aforesaid, in which you claim to be seised of an estate in fee simple, comprised within the description following, that is to say, seven acres and twenty-nine hundredths of an acre, and being composed of parts of lots three, four and five in concession B of the township of Hamilton aforesaid, the same having been selected by the aforesaid company for the site of the Grand Trunk Railway of Canada, and which has been staked off by the said company according to the plan of the said railway: and take notice further, that the company are willing to pay, in accordance with the provisions of the "Railway Clauses Consolidation Act," the sum of £433 15s., as compensation for the fee simple of the said piece of land hereinbefore described, and damages sustained in consequence of the said railway: and that unless such sum shall be accepted by you as such compensation aforesaid, and unless, upon your signifying your acceptance thereof to the said company, you shall procure all proper and necessary parties to join in conveying the said piece of land unto the said Grand Trunk Railway Company of Canada, proceedings will be taken by the said company, in accordance with the provisions of the said "Railway Clauses Consolidation Act," for the purpose of obtaining a title to the said piece of land; and take notice further, that in the event of the sum above mentioned not being accepted as full compensation for the fee simple of the said piece of land, Thomas Eyre, of the town of Cobourg, Esquire, will be appointed as the arbitrator of the said Grand Trunk Railway Company of Canada, and as such to act in pursuance of the provisions of the said "Railway Clauses Consolidation Act."

Dated this 13th day of March, A.D., 1856.

THOMAS GALT, Solicitor,  
G. T. R. of Canada.

And on the said notice was endorsed a certificate by John K. Roche, a sworn surveyor for Upper Canada, in the words and figures following, that is to say:

"I, John Roche, of the town of Port Hope, being a sworn surveyor of that part of the province of Canada, formerly constituting the province of Upper Canada, do hereby certify and declare, that the piece of land in the annexed notice described, is shewn on the map or plan of the Grand Trunk Railway, deposited in the office of the clerk of the peace of the county of Northumberland, in which county the said piece of land is situate, and that the said piece of land is required for the railway of the said company: and I do

hereby further certify and declare, that I know the said piece of land in the said annexed notice described, and that the sum of £433 15s. in the said annexed notice offered by and on behalf of the said Grand Trunk Railway Company of Canada, is, in my opinion, a fair compensation for the said piece of land, and for all damages sustained by the construction of said railway. In testimony whereof I do hereby give this my certificate, in pursuance of the provisions of the "Railway Clauses Consolidation Act."

Dated this 13th day of March, A.D., 1856.

(Signature) JOHN K. ROCHE.

And the plaintiff, within ten days after the service of the aforesaid notice on him, caused a notice to be served on the defendants, of which the following is a copy: that is to say,

"To the Grand Trunk Railway Company of Canada—I, Thomas Grimshawe, of the Township of Hamilton, in the county of Northumberland, Esquire, hereby give you notice that I refuse to accept the sum of money mentioned as compensation in the notice served on me under date of the thirteenth day of March instant; and further, that I have appointed John Montgomery Campbell, of the township of Haldimand, in said county, Esquire, as my arbitrator.

"THOS. GRIMSHAWE.

"Dated this 20th day of March, 1856."

And after service of the last mentioned notice, the arbitrators so appointed by the plaintiff and the defendants duly appointed John Shuter Smith, Esquire, as third arbitrator, of which the plaintiff and the defendants had notice; and the said three arbitrators had a sitting on the 24th day of June, 1856, pursuant to appointment, of which due notice was given the plaintiff and to the defendants; and they the said arbitrators were then duly sworn, and took the oaths prescribed by the said statute to perform the duties of their office, and then adjourned their sitting, at the request of the said Thomas Eyre, till the 3rd day of July following, at a certain hour and place, of which the plaintiff and the defendants had due notice:

That on the said 3rd day of July, before the meeting of said arbitrators, a notice, of which the following is a copy, was, by direction of the Grand Trunk Railway Company of Canada, served personally on the plaintiff:

"Take notice, that the Grand Trunk Railway Company of Canada do not desire to proceed any further under the notice served upon you of the 14th day of March last past, and that the same is, in pursuance of the 16th sub-section of

the eleventh clause of the "Railway Clauses Consolidation Act," hereby desisted from: any damage or costs sustained or incurred by you in consequence of the said notice and desistment will be promptly paid by the company."

That on the said 3rd day of July, at the same time that the above notice was served, and before the meeting of the arbitrators, a new notice was given by the company, under the provisions of the said 16th sub-section, for the same lands as those mentioned in the first notice, but with an alteration in the amount, the company thereby offering £450 in place of £433 15s., and naming the said Thomas Eyre as arbitrator for the company in case the sum therein mentioned was refused, which said notice was accompanied by the certificate of a sworn surveyor of Upper Canada, disinterested in the matter, and not being the arbitrator named in the notice, that the land named in the notice is shewn on the map or plan of the Grand Trunk Railway, deposited in the office of the clerk of the peace of the county of Northumberland, in which the land is situated: that he, the said surveyor, knew the said land, and that the sum so offered was in his opinion a fair compensation for the land, and for all damages sustained by the construction of the said railway.

That after said new notice had been given, the said arbitrators, John Shuter Smith and John Montgomery Campbell, knowing that the said new notice had been given, and that defendants had given notice as aforesaid of their having desisted from said first notice, having met at the place and hour appointed, the said other arbitrator, Thomas Eyre, then stated his intention of not being present (he having been informed by the defendants of their having desisted from said first notice) the said two arbitrators, John Shuter Smith and John Montgomery Campbell, then present, at the request of the plaintiff proceeded to take evidence on the part of the plaintiff, and at the said meeting adjourned the said meeting until the ninth day of July then next, at a time and place of which the said Thomas Eyre had due notice, on which said ninth day of July the said Smith and Campbell (the said Thomas Eyre not being present), at the time and place so appointed made the award in the declaration mentioned, of which the defendants had immediate notice, neither the said defendants nor any one in their behalf attending before the said arbitrators on either of the two last mentioned occasions.

That on the 16th day of August, 1856, the said Thomas Grimshawe not having appointed any arbitrator to act on



his behalf, pursuant to the said new notice, an order, of which the following is a copy, was made by George M. Boswell, then being judge of the county court of the United Counties of Northumberland and Durham :

*“ In the matter of the arbitration between the Grand Trunk Railway Company of Canada, and Thomas Grimshawe.”*

“ Upon reading the notice and certificate served upon the said Thomas Grimshawe, on the 3rd day of July last past, and the affidavits and papers attached thereto, this day filed, and it appearing to my satisfaction that the said Thomas Grimshawe has not, within the time appointed by statute for that purpose, notified to the said company his acceptance of the sum offered by them in the said notice so served upon him, I do hereby, in pursuance of the Railway Clauses Consolidation Act, and upon application of said company by their counsel, appoint J. Stoughton Dennis, of the city of Toronto, a sworn surveyor for Upper Canada, to be sole arbitrator for determining the compensation to be paid for the land and damages referred to in the said notice ; and I do hereby fix and appoint Monday, the 15th day of September instant, as the day on or before which the award of such sole arbitrator shall be made in the premises.”

That the said order was made by the said judge at the request of the defendants and that the sole arbitrator thereby appointed proceeded thereunder to make, and did make an award, which award is agreed to be considered for the purpose of this action a valid award, if the defendants had power to desist from the first notice aforesaid, and the reference thereunder. (But the plaintiff expressly reserves his right to object to the said last-mentioned award, if the judgment of the court shall be against him in this case.)

That the said judge's order was made after a protest by the plaintiff, he having attended before the said judge at the time of making said order, and having formally protested against the same, and having given notice to the said judge, and also to the defendants, of the said first-mentioned award, and the aforesaid proceedings prior thereto.

The questions for the opinion of the court are :

First. Whether under the acts stated in the foregoing case the award made by the said Smith and Campbell is a valid and good award, and binding on defendants.

Secondly. Whether under the facts, as hereinbefore stated, the defendants had power to desist (in manner aforesaid) from proceeding under the first notice, so as to put an end to the arbitration thereunder.

If the court shall be of opinion that the defendants had



power to desist from proceeding under the first notice, so as to put an end to the said arbitration, or that the award in the declaration mentioned is not a valid award, then judgment of *nolle prosequi*, with costs of defence, shall be entered for the defendants.

“ If the court shall be of opinion that under the facts stated the award in the declaration mentioned is a valid award, and binding on the defendants, then judgment shall be entered for the plaintiff for £3,216 5s. 9d., and interest on the sum of £3,116 5s. 9d. from the said ninth day of July until judgment, and costs of suit, upon payment whereof the defendants shall be entitled to a good and sufficient deed in fee simple from the plaintiff for the land mentioned and described in said first notice.

*D. B. Read*, for the plaintiff, cited *Webb v. Manchester, &c. R. W. Co.* 1 R. W. Cas. 599 ; *Schwinge v. London and Blackwall R. W. Co.*, 1 Jur. N. S. 368 ; *Meynell v. Surtees*, Ib. 742 ; *Evans v. Lancashire and Yorkshire R. W. Co.*, 17 Jur. 880 ; 7 R. W. Cas. 126.

*Galt* for defendants.

The statutes referred to are noticed in the judgment.

ROBINSON, C. J.—The 11th clause of the Railway Clauses Consolidation Act, 14 & 15 Vic., ch. 51, provides, in a manner substantially the same as the English Railway Clauses Consolidation Act, for enabling companies to occupy and acquire such land as they may find necessary for the construction of their railway, and for giving compensation to the proprietors of the lands taken.

The provisions are much the same in both, which require the company to mark out and give notice of the lands which they will require, and to tender the sum which they assume to be the reasonable value of such land, naming at the same time an arbitrator on their part, to join with others to be chosen, for assessing the value in case the sum tendered shall be rejected, and providing for the arbitration which in such cases is to follow.

But our statute 14 & 15 Vic., ch. 51, section 11, subsec. 16, contains the following enactment, which is not to be found in the Imperial Statute (8 & 9 Vic., ch. 20): “ Any such notice for lands, as aforesaid, may be *desisted from* and new notice given, *with regard to the same or other lands*, to

the same or any other party; but in any such case the liability to the party first notified, for all damages or costs by him incurred in consequence of such first notice and desistment, shall subsist."

We have to determine in this case what is the proper construction and effect of that clause.

1st. Does it apply to so late a stage of the proceedings as had been arrived at in this case; that is, when the arbitrators had been all appointed, and had met, and were engaged in the duty which they had undertaken, though they had not yet determined upon the value?

2ndly. If so, does it necessarily put an end to the authority to proceed further in the arbitration, so that an award afterwards made under that notice is void?

We need not go further, and consider what proceedings should take place under the new notice, because the whole question now before us is whether the award made under the first notice can be enforced, notwithstanding a new notice was given before the award was made.

On the plaintiff's side it has been contended that it can never have been meant that under this provision the authority of the arbitrators who were proceeding under it should be in effect revoked, which is what the defendants contend for, because then, if the company should be dissatisfied with the third arbitrator chosen, or should be alarmed by or dissatisfied with the disposition shewn by the three after they have met, they can disable them from proceeding by giving a new notice; and that by persevering in that course, and giving new notices till they are satisfied by what they hear and see that such an award will be made as may suit their views, they can effectually control the whole proceedings: and they argue that, no such privilege of interrupting the arbitration being given to the proprietor of the land, it never can have been meant to be applied as the defendants are endeavouring to apply it, or the parties would stand on a very unequal footing.

There is much force in this argument, though to push it to its full length as I have stated, it assumes what is perhaps not clear—that if the defendants by the new notice they have given have in effect revoked the authority of these arbitrators, it must follow that they can go on giving new notices under the same provision until they have procured such arbitrators as will suit them.

That may or may not follow. At present I do not con-

sider that it would. We are not now called upon to determine that point, but only whether the proceedings of the arbitrators first appointed can be thus cut short,

By the Imperial statute 8 & 9 Vic., ch. 20, sec. 126, it is enacted that after any appointment (of arbitrators under the act) shall have been made, neither party shall have power to revoke the same without the consent of the other.

This shews plainly enough what the parliament which passed that statute thought just to provide in such cases.

Whoever framed our statute 14 & 15 Vic., ch. 51, must, it is plain, have had these English clauses under his view. No one who compares the two acts can doubt it; and so we must assume had the parliament of Canada which passed the act now in question. And when we find that the Parliament of this Province not only left out of their statute that express enactment of the English act which prevents revocation of the submission by either party, but also inserted this 16th sub-section of the 11th clause, which they found no precedent for in the other, a strong argument arises from it that they did intend to allow the company to put an end to the authority of the arbitrators who should be chosen under the first notice, at least, by giving a new notice.

I do not know whether a precedent was found for such a clause in other enactments for similar purposes either in England or elsewhere.

It is contrary to the general principles of legislation, and the decisions of courts in England, that a power should exist of recalling the first notice.

The question had been discussed in England both in reference to the Railway Consolidation Clause act, 8 & 9 Vic., ch. 20, and the general act which provides power to take lands for other public works, 8 & 9 Vic., ch. 18, and other statutes of an earlier date giving similar powers. I refer to the case of *Rex v. Hungerford Market Company* (4 B. & Al. 327), and *Tower v. Lynn Railway* (4 R. W. Cas. 615); *Regina v. Commissioners of Woods, &c.*, 19 L. J., (Q.B.) 497.

It is very clear that we cannot deny that the notice given under our general act can be recalled, for the language on that point is perfectly explicit; and one can imagine the

considerations that might suggest such a clause, and might make the Legislature think it proper to adopt it, and with the intention too that it should have the effect which the defendants in this case contend for.

But we have only to consider what is in fact its obvious import and effect.

The company, after serving a notice of land required by them, might for good reasons change their mind, either in regard to the quantity which they had specified, or its precise locality, and the proprietor could hardly object to the reasonableness of the Legislature allowing them to do so before the arbitration had been proceeded in, or at any time before it was closed ; but here, it may be urged, there has been no change of intention, the same land being specified in the second notice as in the first.

Still that is no argument that we can accede to, for the 16th sub-section, which we are considering, expressly allows a new notice to be given "with regard to the *same or other* lands." There is no doubt on that point.

Another ground on which it might seem just to allow the first notice to be recalled, and a new one given, would be when the company might, on more mature consideration, desire to increase their offer, which might perhaps supersede the necessity of going on with the arbitration, and might save them costs.

Here there is just a semblance, and that is all, of the defendants having proceeded on that ground, for they do specify in their new notice a value a few pounds higher than they had offered in their first. We can have little doubt, however, that this slight difference does not account for the step taken by them. They desired, no doubt, and have not disavowed it, to submit the matter to other arbitrators, because they were not content with those who had been chosen.

Can they then, as a matter of right, and under a fair application of the statute, attain that object? I do not think that we can decide otherwise. The position in which the 16th sub-section stands in the 11th clause makes it evident, I think, that it was meant the discretion might be used after all the arbitrators had been appointed, and they had entered upon their duties.



And I can only look upon the notice of desistance from the first notice as a discontinuance of all further proceedings under it. This I think is shewn by the provision that the company shall be liable to the other party for any costs incurred by him in consequence of the first notice. And indeed, without that consideration, I do not see what we could hold to be the meaning of desisting from the notice, which the company is in express terms allowed to do, if all might still go on under the notice desisted from as it would have done otherwise.

In the absence of any explanation in the statute to the contrary, I can only understand by the 16th sub-section that all future proceedings under the notice *desisted from* are to cease, and that a new arbitration is to be entered upon under the new notice.

Therefore, in my opinion, according to the terms of the case submitted to us, a *nolle prosequi* is to be entered, for according to the view I take of the clause submitted to us, the act of the arbitrators in going on and making an award after the notice had been "*desisted from*," to use the phraseology of the statute, was a void act.

I do not think that the legal question raised here is at all affected by the fact of the defendants having erected and constructed their road, and being now in possession of the plaintiff's land. That is not necessarily wrongful, because the statute allows them to take possession in certain cases before an award made, and when no agreement has been come to. If this is not one of those cases, it would only follow that the right to take and keep possession is subject to be questioned: it could have no influence on the legal construction of this clause.

MCLEAN, J.—The Railway Clauses Consolidation Act, section 11, establishes a mode by which a railway company may obtain any lands necessary for the construction of their road, and the matter of proceeding by arbitration to ascertain the value of such lands, when there is a difference of opinion upon that subject. A part of the plaintiff's property being required by the defendants for their railway track, they offered to the plaintiff £433 15s. as compensation for

the land they desired to obtain, at the same time accompanying their proposition with the certificate of a sworn surveyor, in the form prescribed by the seventh sub-section of the section referred to. The plaintiff promptly rejected the amount proposed, and named an arbitrator to act in his behalf, with one previously appointed by the defendants, to settle the question of value. They appointed a third arbitrator, and all met, at a time appointed, for the purpose of deciding upon the matter submitted to them, on the 26th of June, 1856. At the request of the arbitrator named by the defendants the meeting was adjourned from that day till the 3rd of July following, of which due notice was given. Before the arbitrators met on the 3rd of July, a notice was served on the plaintiff, by direction of the defendants, under the 16th sub-section of the same clause, "that the defendants did not desire to proceed any further under the notice served upon the plaintiff on the 14th of March last past, and that the same was in pursuance of that sub-section desisted from, and that any damages or costs sustained or incurred by the plaintiff in consequence of such notice, and of the defendants' *desistment* (the term used in the act) would be promptly paid by defendants. After the giving of such notice the arbitrator appointed by defendants refused to attend, or to go on with the reference under the notice of the 14th of March.

On the 3rd of July the defendants gave to the plaintiff a new notice, and offered £450, the only variance between it and the former notice being a slight variance in the amount which they were willing to pay; and they at the same time notified the plaintiff to appoint an arbitrator on his behalf, to act with the *same* arbitrator for the defendants, in reference to the valuation of the land, in the event of the last proposition not being accepted.

The plaintiff not considering that the defendants could legally abandon the first reference, and so require him to enter into another, did not again appoint an arbitrator, but two of the arbitrators previously appointed proceeded to make an award in the absence of the third, and allowed by such award to the plaintiff the sum of £3,116 5s. 9d. as

the value of land and damages—upon which award this action is brought. The defendants' plea sets forth all the facts, and the statement of the case shows that the plaintiff not having appointed an arbitrator to act with the arbitrator named in the second notice of the defendants, an application was made by George M. Boswell, Esquire, judge of the county court, to appoint a sole arbitrator between the parties, and that on such application a sworn surveyor was appointed, in pursuance of the 9th sub-section of the 11th clause of the statute, who duly made his award in the matter.

The questions now submitted in the special case agreed upon are—1st. Whether under the facts stated the award made by two arbitrators after notice of the defendants desisting to act on the first notice, and in the absence of the arbitrator who refused to act, is a valid and good award, and binding on the defendants. 2ndly. Whether under the facts stated the defendants had power to desist, in the manner mentioned, from proceeding under the first notice, so as to put an end to the arbitration thereunder.

The answer to each of these questions depends upon the view taken of the other, for if the award be held valid, then the defendant must be held to have had no right, by desisting from the first notice, to put an end to all proceedings under it; and if they had that right, then the award cannot be maintained.

The 15th sub-section referred to certainly confers an extraordinary authority on a railway company, in giving them the power to desist from or stay proceedings on any notice such as that served on the plaintiff on the 14th of March, and to give a new notice to the same party, with regard to the same or other lands, at any time before award, when it may suit the convenience or caprice of the agents of a company. The exercise of this power in this case can scarcely be regarded as otherwise than a vexatious proceeding, for the defendants could scarcely have desisted from their first notice for the purpose of adding so paltry a sum as £16 5s. to their former offer, as a temptation to the plaintiff to accept their proposition, and at the same time ask the plaintiff to appoint an arbitrator to meet the very same individual,

who having taken upon him the duties at the first meeting subsequently refused to attend, or to act under the original notice.

No doubt some object was expected to be gained by the defendants in desisting from their first notice, or they would not have done so; but it certainly bears the appearance of trifling with the plaintiff, and it may have been that the defendants desired to get rid of some one of the arbitrators, whose decision was likely to be less favourable than suited their views. While the plaintiff was bound to submit to the award, whatever it might be, and had no means of getting rid of any of the arbitrators, the defendants could avail themselves of the very unusual authority referred to, to dissolve the reference whenever they had reason to think the award was likely to exceed to any extent their ideas of the value of the plaintiff's land.

But the question is not whether the power which they have exercised in the case of the plaintiff was rightly or wrongly conferred; the only question is whether in fact they have it, and on which I must say that I can scarcely think there is any doubt.

It may be reasonable that a railway company should be at liberty to withdraw an offer of small amount, and to make a larger for land required by them, rather than await the delay and expense of an arbitration; but the same authority to desist would enable them to withdraw a large and to substitute under a new notice a small offer of compensation, with a view to take their chance before an arbitration, and the provisions of the sub-section 16 certainly authorise such a proceeding, subject only to any costs which may have been incurred under the former notice. When it authorises a *new* notice to be given "with regard to the same or any other lands, to the same or any other party," it could not have been intended that after the new notice given the old one should still continue in sufficient force to justify proceedings under it. The words, as they appear to me, are too plain to admit of any construction but such as the defendants have given them by their mode of proceeding, and there appears to me



to be no alternative but to declare the award made by two arbitrators under the first notice invalid.

Besides the objections taken, it appears to me that the making of an award by two arbitrators in a case where the third has refused or failed to act, must be invalid under the 15th sub-section of the 11th clause of the Railway Clauses Consolidation Act. That Act provides, that if any arbitrator *appointed* by the *parties* shall die before the award is made, or be disqualified, or refuse or fail to act within a reasonable time, then on proof of the fact before the county court judge, on the application of either party, such judge may in his discretion appoint another arbitrator in the place of the one previously appointed by him, and the company and party may each appoint an arbitrator in the place of their arbitrator deceased or not acting, but no recommencement or repetition of prior proceedings shall be required in any case.

Now when one of the arbitrators refused to act, as is shewn in this case, if it was considered that the original notice still continued good, that section provides a means of reorganizing the arbitrators; but it seems to forbid the idea that an award may be made by two after the death of the third or his refusal to act. This objection to the award has not been formally taken, but the facts are disclosed, and we are asked to say whether under these facts the award can be considered valid. Of course it cannot be valid if the mode contemplated by the statute has been departed from in making it without the consent of parties.

BURNS, J., concurred.

Judgment for defendants.

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## HARRINGTON V. HARRINGTON.

*Loan for special purposes—Breach of agreement—Money lent.*

Plaintiff lent to defendant £35, upon a verbal agreement that he should build with it a house upon a lot belonging to him, in which the plaintiff and her mother should live during the mother's life. The house was built, and they went into possession on this understanding, but afterwards it was verbally agreed that defendant should give the plaintiff a lease during the life of the mother. He, however, mortgaged the premises to a third party, and having had some dispute with the plaintiff, brought ejectment to turn her out.

*Held*, that the plaintiff might recover back the £35 as money lent.

This was an action of assumpsit brought by a sister against her brother for money loaned to him.

The case was tried at the last assizes held at Hamilton, before *Burns, J.*, and a verdict found for the plaintiff for £24, leave being reserved to the plaintiff to move the court to add £35, and £5 for interest upon it, to the verdict, in case the court should be of opinion upon the following facts that the plaintiff was entitled to recover it in this action.

It appeared that the defendant was the owner of lot No. 227, on the corner of Catharine Street, in the city of Hamilton, upon which there was a small house, in which the defendant lived by himself. The plaintiff and her mother lived together in another part of Hamilton at that time. In the month of May, 1854, the defendant borrowed £35 from the plaintiff, his sister, with which he represented he would build a house upon the same lot, and in which the plaintiff and her mother should live during the lifetime of the mother. The plaintiff loaned the defendant the £35, besides other sums before and after that, which latter sums made up the sum of £24 for which the verdict was given. The house was subsequently built by the defendant, and completed by August, 1855, so that in that month the plaintiff and her mother occupied it, and had occupied it ever since. The plaintiff was to have had a lease of the house, to hold during the lifetime of her mother, and the parties appeared before a solicitor in order to have one prepared, but it was not done, and afterwards he said they should depend upon his word for it. In October, 1856, the plaintiff and defendant had some dispute, in consequence of the plaintiff being about to

be married, and then the defendant endeavoured forcibly to turn the plaintiff and her mother out of possession, but failing in that he commenced an action in ejectment to obtain the possession, which action was pending at the same assizes, to be tried at a future day. It appeared further that the defendant had on the seventh of April, 1855, conveyed the premises—that is, the whole lot including the house erected for the plaintiff—by way of mortgage, conditioned to pay £175, in four equal annual instalments, payable on the 6th of November in each year. The witness who proved the loaning of the money was the mother of both the parties, and she stated that the plaintiff and she went into the occupation on the verbal understanding with the defendant that the plaintiff should have the house as long as the mother lived, but that after they had entered into the place it was then agreed that the defendant should give a deed or lease to the plaintiff for the lifetime of the mother for the £35.

The plaintiff contended that the agreement to become tenant for the life of her mother was void, there being no writing; and that the defendant bringing an action of ejectment proved that he considered there was no agreement, and therefore the plaintiff could maintain an action to recover the money back, as upon a total failure of consideration.

The defendant contended there was no violation of any contract on his part; that the bargain was only verbal, that he should allow them to occupy the house, and he had done so; that if any bargain for a lease was proved, it was proved to have been made after the house was built, and possession taken; that the plaintiff had not done anything to rescind the contract on her part; and the remedy, if any, was for special performance of the contract.

The learned judge took the opinion of the jury upon the question, whether there was any agreement respecting a lease at the time the money was loaned, and they found that no agreement was made at that time for a lease of the premises, and that nothing was said about a lease between them until after the possession was taken by the plaintiff.

*Martin* obtained a rule according to the leave reserved, to add £40 to the verdict already rendered in the plaintiff's

favour. He cited Story on Contracts, Sec. 480; Wright v. Newton, 2 Cr. M. & R., 124; Har. Dig. 5897.

*Eccles*, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion upon the evidence, as reported by the learned judge, that this rule for adding £40 to the verdict should be made absolute.

The witness on whose testimony the plaintiff's case rests, the mother of both parties, represents the £35 as having been *lent* by the plaintiff upon the understanding that it should be applied in building a small house upon the defendant's land, which the plaintiff, who lent it, and the mother were to occupy so long as the mother lived.

There could be no binding assurance to the plaintiff that she should have the advantage on which she reckoned until a proper deed should be executed by the defendant conveying an interest to the plaintiff to last during the life of his mother. It seems by the mother's account, which appears to be perfectly candid, that although the money was *lent* for the purpose and with a view to such an arrangement, yet the verbal agreement to that effect was not till after the loan. Then surely the just way to look upon the transaction is that the £35 should be treated as a loan, which the defendant had the privilege of repaying in the manner afterwards spoken of; but that he must be taken as having renounced the privilege, and so being bound to repay it as money lent, when we find him refusing to give any legal title to the possession, entering and throwing out the plaintiff's goods, bringing an action of ejectment to dispossess the plaintiff and her mother, and giving a mortgage on the property, which places the possession of the house at the mercy of a third party. The case of Wright v. Newton (2 Cr. M. & R. 124), cited by Mr. Martin, is much in point.

Rule absolute.

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IN THE MATTER OF THE INQUEST UPON THE BODY OF  
WILLIAM MILLER, DECEASED, BY SILAS W. COOKE, ONE  
OF THE CORONERS FOR THE COUNTY OF BRANT.

*Coroner's inquest—Irrelevant verdict—Amendment—13 & 14 Vic. ch. 56.*

At an inquest held upon the body of a boy who had committed suicide, the verdict, after finding the cause of death, stated that from evidence submitted the jury judged that the boy's master, a medical man, had not done justice to him according to his agreement made with the boy's father in Scotland, in regard to his clothing and the labour he had to perform.

*Held*, that the latter part of the verdict was relevant and within the province of the jury; and although the evidence seemed to preponderate the other way, the court could not on that account alter the finding.

*Burns* obtained a rule on the coroner, to shew cause why the inquisition should not be quashed or amended, on the ground that the latter part of the verdict of the jury on the said inquest, after finding the cause of the death, is irrelevant, extrajudicial, surplusage, and unfounded, and was inserted with a malicious motive to injure Robert Christie, Esquire, named in the said verdict, and is calculated to bring him into disrepute; and that the same be struck out of the said verdict; and why a *venire facias* should not issue to bring the said coroner into court, in order to have the said inquisition and verdict quashed or amended as aforesaid.

The inquest was held on the 2nd of April, 1857, and had been returned into this court upon a certiorari.

The verdict of the jury was that "William Miller, now lying dead in the house of Robert Christie, Esq., M. D., came to his death by administering with his own hands strychnine during the afternoon of Tuesday, the 31st day of March, but we judge from the evidence submitted, that he, Christie, had not done justice to the lad, according to his agreement made with the boy's father in Edinburgh, Scotland, in regard to his clothing and the labour he had to perform."

The inquest had been filed with the clerk of the peace, to whom as well as to the coroner the writ of certiorari was directed.

The boy, as appeared from the evidence returned with the inquest, was about fourteen years of age. Dr. Christie came out from Scotland to Canada in 1853, and by agreement with the boy's father brought him out with him as an apprentice,

to do such work as might be required of a servant until he should be twenty-one years of age. He was to treat him well, and to give him instruction in medicine and surgery, and to qualify him for practising if the boy discovered ability to learn. After being some time with Dr. Christie's father on a farm near Paris, in Upper Canada, he went to live with Dr. Christie, and had been with him between two and three years, when, on the 31st of March, in the afternoon, he went up into a hay-loft, and while lying there cried out in great agony that he was dying. Mrs. Christie on being told this by a servant went out to him, and was told by the boy that he had taken strychnine.

He used to attend in the shop occasionally, and was acquainted with medicines. It was clearly proved that his death was occasioned by taking a large dose of strychnine. Many witnesses were examined.

There was evidence that he had complained of insufficient food and clothing, and of being over-worked, and had expressed himself as if he was weary of life and wished to die; also that he had spoken of running away.

On the other hand, many witnesses gave a different account of the manner in which the boy was treated.

*M. C. Cameron* shewed cause.

ROBINSON, C. J. delivered the judgment of the court.

There was enough perhaps in the evidence to warrant the finding of the jury, if it had been uncontradicted; and it is impossible for us to come to the conclusion that the jury was not honestly under the impression produced by the testimony, the appearance of the body, and the fact of self-destruction not accounted for by any want of sound understanding in the boy, that he had been driven to the fatal act by a want of reasonable and kind treatment on the part of his master, though the evidence is very strong the other way, and seems to preponderate in favour of the opposite conclusion. It cannot be said that the inquiry into the cause of the boy taking poison was irrelevant: it was evidently the duty of the jury; it bore upon the question whether it was accidentally done and by mistake, or in consequence of insanity. Such inquiry

into the inducements which led to the act are constantly made at inquests ; and though the jury may seem to have come to a conclusion upon light evidence, we cannot on that account alter their finding.

The statute 13 & 14 Vic., ch. 56, has evidently a very different object in view from that which is sought to be accomplished by this application.

Rule discharged.

CINQUEMARS ET AL. V. THE EQUITABLE INSURANCE  
COMPANY. (*Two cases.*)

*Insurance—Production of Vouchers.*

*Held*, referring to CinquMars v. The Equitable Insurance Company, ante page 143, that the evidence set out below, being substantially the same as in that case fully supported a verdict for defendants on the plea setting up that vouchers and explanations, which the plaintiff could have given, had not been furnished as required, which under the policy was a bar to the action.

One of these actions was on a policy of insurance against fire, granted by the defendants on the 23rd of November, 1853, for £1000, upon cloths and ready-made clothing, the property of the assured, then being in a store occupied by them in the town of Belleville. The policy to be in force for a year.

The other was upon a policy granted by the defendants to the same plaintiffs on the 9th of January, 1854, for £500, on ready-made clothes, and cloths, flannels, and other articles such as are usually kept in a clothing store ; which goods at the time of insurance were in a store in the village of Sterling, but were afterwards, with the consent of the company, removed to the same store in Belleville in which the other goods were.

The goods were lost by fire on the 24th of May, 1854. There had been also another insurance upon the same goods effected with the Ontario Insurance Company for £1000, which was still in force.

The action of the plaintiffs against the defendants upon the policy for £1000, was tried at Belleville at the previous assizes (in October, 1856), when a general verdict was found for the plaintiffs for £1000, but a new trial was granted, on

the ground that the verdict was contrary to evidence, and ought to have been for the defendants upon the tenth issue.

That plea set up the same defence in substance as was set up in the fifth plea in the action upon the other policy granted by the defendants for £500 ; namely, that after the loss, the defendants required the plaintiffs, or one of them, to make proof of the said loss and damage, by the production of their books of account and other vouchers, according to the terms of the tenth condition indorsed upon the policy, but that the plaintiffs did not, nor did either of them make such proof or produce the said books of account, or any other vouchers although they, the plaintiffs, then had such books of account and vouchers in their possession, and could and might have produced the same ; and so the plaintiffs say that the defendants did not, nor did either of them, in all things conform themselves to or observe the said stipulations, conditions, matters and things, which on their part were to be observed and performed, according to the form and effect of the said policy, &c.

The pleadings in the action in which the verdict was given in October last, and the evidence upon that trial, are fully stated in the report of the application that was made against that verdict—ante, page 143. Both actions depended upon the same testimony. At the last assizes, at Belleville, before *Hagarty, J.*, the action upon the policy for £500 was brought to trial, and it was agreed that the other suit should abide the result of this.

It appeared to the learned judge that the evidence was such as entitled the defendants to succeed upon the plea setting up the defence mentioned, and he so directed the jury, and they found accordingly for the defendants upon that plea, which barred the action, for by the tenth condition endorsed on the policy it was expressly made incumbent upon the party assured to make proof of the loss according to the forms prescribed within one calendar month, and if required by the production of their books of account, and other proper vouchers and to give such further explanation therein as might be necessary ; and it was expressly declared that until such proofs were produced,



and explanation given, the amount of the loss should not be payable.

*O'Hare* obtained a rule *nisi* to set aside the verdict on the ground of misdirection. He contended that it should have been left to the jury to find whether in fact there were not goods such as were insured consumed by the fire, of which the plaintiffs had it not in their power to produce invoices, or give further information than was given, and whether the evidence that was given upon the trial of the value of the goods lost, did not shew that the plaintiffs were entitled to recover for the whole amount insured in the policy. It was also urged as a ground for a new trial that upon the second trial the defendants' counsel, was allowed to read to the jury portions of the judgment said to have been given by the court when they awarded the new trial in the other action.

Upon the latter point it appeared that the defendants had obtained from the reporter, as is usual, a copy of the judgment of the court given in Hilary term, and made some observations upon it to the jury. The learned judge told the jury that anything said in that judgment respecting the evidence which was before the court, could not be taken as proof upon the trial then going on before them, because they must determine only upon what had been sworn to before them, but that any remarks made by the court respecting the legal principles involved in the pleadings, and the proofs necessary and sufficient on the one side or the other, to entitle either party respectively to succeed upon such a defence, might be brought under the consideration of the jury.

*Galt* shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We think that the evidence given upon the plea in question well supports the verdict. The plaintiffs had £2500 in all covered by the three policies, and could not be entitled to recover the full amount of either policy, unless they gave satisfactory proof that they had goods to that amount destroyed by the fire, or in consequence of it, and goods of such descriptions as were insured.

About £700 worth of goods were saved, and the plaintiffs had been selling ever since they commenced business in the autumn. It was therefore reasonable that the defendants should call for such proof as the plaintiffs had it in their power to furnish, that after deducting the goods saved, and the goods sold, they had received in their store such further amount of goods as would make their loss amount to the full amount they had insured.

One of the plaintiffs, Peter J. CinquMars, was called on the trial, and he swore, as he had done before, that having made over their claim under this policy to certain creditors of theirs, Messrs. Brown & Swan (though the policy itself had not been assigned), the Messrs. Brown & Swan had instituted proceedings on the policy, and were endeavouring to enforce the same exclusively for their own benefit or the benefit of their creditors, for it seems that since the insurance Messrs. Brown & Swan have become insolvent, but he, Peter CinquMars, was unwilling that the insurance should go to them alone, instead of being distributed rateably among his creditors; and that in order to prevent Messrs. Brown & Swan succeeding in their attempts to recover the insurance, he had forborne and declined to give information of the amount and particulars of the goods which had been forwarded to the firm in Belleville from his house in Montreal.

He swore that when he heard of the transfer of the claim under the policy to Messrs. Brown & Swan he went to McLean, the chairman of the board, who manages the defendants' business in Montreal, and told him he would not prove the loss until he had arranged about the policy, for that he wished the insurance to go to the benefit of all his creditors.

The defendants' agent in Upper Canada proved that immediately after the loss he went to Belleville and saw Charles J. CinquMars, the partner carrying on the business at Belleville, and requested to see the invoice book, but he was told that it was the only one that was lost, and he then requested to be shown the invoices themselves. He said he could get duplicates from his brother's (Peter's) books in Montreal, and left to get them, but no invoice or copy was furnished. They shewed him the amount of the sales, but not the invoices of goods received.

Peter CinquMars swore that the large amount of goods forwarded by him from Montreal were either taken from his own store or purchased by him from other parties in Montreal, of which purchases it is reasonable to presume the particulars might have been obtained, if Peter CinquMars had furnished the defendants with their names.

The same correspondence was produced on this trial as on the former, requiring on the part of the defendants such information as might enable them to trace the purchase of goods made for the store at Belleville, and the plaintiffs' solicitor maintaining that what had been furnished was all they were bound to furnish.

The letter also of Mr. Brown to Charles CinquMars, of the 26th of December, 1854, which was proved on the former trial was produced and proved on this.

We think the evidence well supported the verdict given for the defendants on the fifth plea.

Rule discharged in both cases.

## YOUNG AND RAMSAY V. BENJAMIN HUBBS.

### *Deed—Escrow—Evidence of delivery.*

Defendant executed a deed of bargain and sale in the usual form, purporting to convey to his son William Hubbs the land in question. It was stated in the attestation clause to have been signed, sealed *and delivered*, and the two subscribing witnesses could not recollect anything said about a future delivery at the time of execution, at which the grantee was not present. Defendant however claimed that the deed was delivered only as an escrow, his purpose being to reserve the delivery until he should be sufficiently satisfied with the conduct of his son; and the reason given for making the conveyance at the time, was that being then a widower, and about to marry again, he desired to cut off any claim for dower. He proved that he had at the same time executed deeds to his other sons, which he had afterwards at different periods given to the grantees; and that before the execution of this deed, William had worked a fulling mill upon this land on shares, under an agreement with his father, which he (William) swore had not been put an end to.

On the other hand it was shown that the grantee had voted on this land, once at an election at which his father was returning officer, and that he had qualified upon it as a municipal councillor; and further, that in a subsequent deed executed by defendant, of part of the same lots, the piece in question was reserved as "heretofore deeded to William Hubbs." It appeared too that the grantee had for more than twenty years lived upon this lot, paying nothing except under the agreement about the mill. The jury having found that the deed was absolutely delivered,

*Held* that the evidence supported their verdict.

EJECTMENT for twenty-five acres, part of lots four and five in the first concession of the military tract, in the township of Hallowell.

At the trial, at Picton, before *Hagerty*, J., the plaintiffs made title under a sheriff's deed made to them on the 8th of November, 1856, as the highest bidders at a sale of this land, under several writs of *fi. fa.* against William Hubbs, at the suit of different creditors, issued in 1855 and 1856, which deed was registered on the 19th of November, 1856.

The defendant in those writs of execution, William Hubbs was the son of Benjamin Hubbs, the defendant in this action, who was admitted upon application to defend as landlord of the defendant named in the ejectment.

It was admitted that Benjamin Hubbs was before and on the 26th of August, 1841, the owner in fee of this land. On that day he executed an indenture of bargain and sale, by which he conveyed these twenty-five acres of land in fee to his said son William Hubbs, for a consideration of £375, acknowledged to have been paid to him by the grantee. This deed had never been registered. It was in the common form, without recitals of any kind, and was stated in the attestation to have been signed, sealed *and delivered*, in the presence of the two subscribing witnesses whose names were signed attesting it.

These two witnesses, both sons of the grantor, were examined at the trial. The both swore that the grantee was not present at the time of execution, but they did not remember that any thing particular was said by the grantor at the time as to any delivery or formality to take place afterwards.

The deed had, it seemed, been always in the possession of Benjamin Hubbs, the grantor, to the time of the trial, when he produced it; and his defence in this action was that he had never delivered the deed to his son William, and did not at the time intend to deliver it, but made it for a particular purpose, which was explained, intending to keep the deed, and reserve the title in himself, till the time might come when he should be so far satisfied with the conduct and circumstances of his son William, the grantee, as to be willing to deliver the deed to him. It was given as a reason for the conveyance, which seemed not to be disputed, that being a widower at the time, and being about to marry a second time, he had executed



conveyances of this and other portions of his real estate to his several sons, in order that the fee might appear to be out of him before coverture, and that his intended wife might thus be cut off from any claim of dower in the lands so conveyed.

It was proved on behalf of the defendant that in April, 1835, he and one Williams, whose interest in the premises was not proved, had made an agreement with William Hubbs, to let him have a carding-machine and fulling-mill of theirs, which were upon the land in question, to work upon shares, for no definite time, but as long as they might all agree, and this agreement William Hubbs, who was examined upon the trial, swore was not yet put an end to. The lease did not seem to extend to any particular quantity of land to be held with the building. William Hubbs had resided on the land in question more than twenty years, and still lived upon it. It was not distinctly proved whether any thing that had been paid in the shape of rent by William Hubbs to Benjamin Hubbs, his father, was otherwise paid than on account of this agreement about the fulling-mill, &c.

On the part of the plaintiffs, to show that William Hubbs had acted as owner of the property since the deed was made to him, it was proved that he had voted on the property three times at county elections, and once when his father Benjamin Hubbs was the returning officer, and that in January, 1855, he had qualified on the property as a municipal councillor, swearing that he owned part of the lot five, which he no otherwise owned than by his father's deed.

About the same time that Benjamin Hubbs made this deed to William Hubbs, he made deeds of gift of other lands to some of his other sons, and these deeds, after keeping them in his own possession for a time, he gave at different periods to the respective grantees.

It was proved, and was relied on as a strong fact on the part of the plaintiffs, that on the 29th of May, 1855, Benjamin Hubbs executed a deed to Henry Hubbs of 140 acres of the same lots four and five, which was registered a few days afterwards; and in this conveyance, after describing the 140 acres by metes and bounds, he added at the conclusion

of the description "reserving nevertheless from the south end of said last mentioned description twenty-five acres heretofore deeded to William Hubbs."

This, it was argued, was an acknowledgement by Benjamin Hubbs under seal that he had deeded—that is, conveyed—the land now in question to William Hubbs. This was before the land was seized and sold by the sheriff under the execution against William Hubbs, and it was not pretended that there was any other deed by which it could have passed from Benjamin to William Hubbs than the one executed in 1841, or that any other ceremony of delivery took place at any time subsequent to its execution.

There was no proof whatever of any declaration by Benjamin Hubbs at the time of execution that he delivered it as an escrow, or that he intended to withhold the delivery.

The learned judge left the case to the jury with proper observations, to which no exception was taken, and they found in favour of the plaintiff.

*Wallbridge*, Q. C., obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection.

*S. Richards* shewed cause, and cited *Doe Lloyd v. Bennett*, 8 C & P. 123; *Doe Garnons v. Knight*, 5 B & C. 671; *Hope v. Harman*, 11 Jur. 1097; *Doe Richards v. Lewis* 11 C. B. 1035.

ROBINSON, C. J., delivered the judgment of the court.

In the case of *Doe v. Knight* (8 D. & R. 360) there is a very elaborate judgment of Mr. Justice Bayley on the subject of deeds being invalid for want of delivery, and on the effect of the grantor always having kept the deed under his own control.

In this case the subscribing witnesses had no particular recollection of anything being said by the grantor about withholding the delivery. The deed is executed in common form, and in the attestation clause it is declared that it was signed, sealed and delivered. This assertion of its delivery which appears on the face of the instrument, is not contradicted otherwise than by the fact of the grantor always having kept the deed in his own possession, and by conversation of his

proved to have taken place afterwards, which we take to be immaterial. The deed remaining in the possession of the grantor would signify nothing if he did deliver it—that is, by words—at the time of executing it, and this although the grantee was not present to receive the delivery.

It would be quite inconsistent with the object for which the deed was executed if it was to remain undelivered, for then the estate would not have been taken out of the grantor before his second marriage, and so the wife would have a claim to dower, which it was the very object of these deeds, according to the evidence, to prevent.

Then the grantee having ever since occupied the land, as we have no doubt the jury were convinced from the evidence, without paying rent, and having voted on it as a qualification to the knowledge of the grantor, all strengthens the presumption that the deed was delivered (that is, by words) as the deed imports, at the time of execution. And the fact, in addition is a strong one, that in the deed made thirteen years afterwards to Henry Hubbs, of land which the grantor had owned, and which by the description in the deed would include this land, the grantor expressly reserves the twenty-five acres now in question because it had been already *deeded by him to William Hubbs*

It is true that the word “*deeded*,” which is not an accurate expression, may mean nothing more than that he had made a deed of the land—that is, signed and sealed it—not that he had passed the estate by a conveyance duly perfected; but without delivery it would not be a deed in the eye of the law, delivery being one of the essentials requisite to make it a deed, and whether it was so delivered or not is a question of fact for the jury. In this case they found that it was delivered; and we think we ought not to set aside their verdict, for that there was enough to convince them that at the time of execution this was intended to be a deed perfect and effectual for passing the estate, and that the grantor had by his subsequent conduct confirmed what the deed in that respect imports: we mean what is expressed in the attestation.

Rule discharged.

## ARNOLD V. BULLER AND SMITH.

*Ejectment—Bond to allow grantor's wife to hold possession—Secondary evidence.*

The patentee conveyed the land in question to the person through whom the plaintiff claimed, and it appeared that at the time of such conveyance a bond was taken to reconvey on payment of a certain sum, and to allow the wife of the patentee to have possession during her life whether the land should be reconveyed or not.

*Held* that the plaintiff could not, in the face of this bond, dispossess the patentee during the life of his wife.

*Held* also, that the secondary evidence of the bond, as stated below, was clearly admissible and sufficient.

This was an action of ejectment, brought to recover the north half of lot number ninety-four on the south side of the Talbot road west, in the township of Howard, county of Kent.

At the trial at Chatham, before *Richards, J.*, the plaintiff claimed as heir-at-law of Frederick Arnold, who derived his title through Christopher Arnold from the patentee of the crown. The defendants asserted title in Smith as tenant during the life of his wife Elizabeth, and in Buller by conveyance from the patentee.

The plaintiff put in the patent to William L. Smith of the whole lot, dated 9th December, 1847, and a deed from the patentee and his wife Elizabeth to Christopher Arnold, of the north half, dated August 1st, 1847, consideration £56 7s. 6d., and it was proved that Christopher Arnold died intestate, leaving Frederick, his eldest son and heir-at-law, and that said Frederick died before the act abolishing primogeniture, also intestate, leaving the plaintiff, his only son and heir-at-law.

It was proved that at the same time that the conveyance was made to Christopher Arnold, a bond was made by him, either to Elizabeth Smith alone, or to her and her husband, with condition that on payment of £56 7s. 6d., the consideration in the deed, he should reconvey the land to Mrs. Elizabeth Smith and that she was to have possession of it for life at all events, whether the money should be paid or not. This bond was put by W. L. Smith into the hands of Mr. Duck, an attorney, in 1854, in whose office it was afterwards destroyed by fire. He gave the above account of its contents, and that it was witnessed by the same two persons as the deed, one of whom the late Ebenezer Renyolds, Esq., for-



merly sheriff of the Western district, wrote both instruments. His hand-writing was proved by the other subscribing witness to the deed, who had no particular recollection of the bond, but remembered that it was understood by him at the time, that Mrs. Smith was not to be disturbed in the possession during her life. She had no children, and on that account, it seemed, the intention was after her death the land should go to her brother and his family.

The secondary evidence was objected to, but the learned judge held that it was admissible; and upon a question submitted by him to the jury, they found that by the bond Mrs. Smith was to enjoy possession of the land for her life, whether the land should be reconveyed to her or not (that is whether she should or should not become entitled to a reconveyance by payment of the £56). The learned judge directed a verdict to be entered for the plaintiff, subject to the opinion of the court, whether upon the evidence and the finding of the jury a verdict should not be entered for the defendants.

*Prince* for the plaintiff.

*Duck*, for the defendants, cited *Commercial Bank v. Muirhead*, 4 C. P. 434.

ROBINSON, C. J., delivered the judgment of the court.

It does not appear to us that there is any room for question as to the admissibility of the evidence that was given of the bond and its contents.

The loss was clearly shewn: the production of it had become impossible. The two witnesses were accounted for. One was dead, and his signature was proved; the other witness was examined, and his statement of the contents of the bond seems to have been satisfactory to the jury.

Then taking such a bond to have been executed, it amounted in effect to this—that the obligor, Christopher Arnold, when he took a conveyance from Smith and his wife of this land, for a consideration expressed of £56 7s 6d., bound himself under his seal to allow the wife of Smith to occupy so long as she lived, and further bound himself that whenever the sum mentioned should be paid back to him with interest he would reconvey the land. We can only under-

stand from this that the land was only mortgaged to Christopher Arnold, though the deed was absolute, the parties relying on a bond to reconvey, which is a very common course in such transactions, and gives to the conveyance the character of a mortgage merely. It would seem also reasonable to infer that the land was worth much more than the money received ; and that being so, and Mrs. Smith being the sister of Arnold, it was natural that it should be stipulated that she should not be disturbed, even if her husband should never be able, or should be unwilling, to redeem the land ; and it would probably be well worth while for the plaintiff to take the land for the £56 upon that understanding ; and taking it that such a bond was given, the heir of Arnold cannot in the face of it dispossess Mrs. Smith, or her husband, who holds in her right.

As we understand the evidence, she has a right to the possession while she lives, whether the money is paid or not. If she should die, and the money remain unpaid, then a different question would be presented, which we need not now enter into. It would seem that no time was limited for paying the money.

We are of opinion that the *postea* should go to the defendant.

Judgment for defendant.

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REGINA EX REL. HALL V. GREY ET AL.

Where the returning officer used the original collector's roll instead of a copy, as directed by the act, having first announced that he intended to do so, and no one having objected.

*Held*, that the election was valid.

*Morris* obtained a rule on defendants to shew cause why the judgment of the judge of the County Court for the County of Grey should not be reversed, and why the election of the defendants should not be set aside, and the relator, Hall, be declared duly elected, on the ground that the returning officer did not procure a correct copy of the collector's roll for the township (of Melanethon), as required by the statute 16 Vic., ch. 181, and on grounds disclosed in the relator's statement and the affidavits filed.

The other grounds in the statement were, that the returning officer would not allow this relator's name to be inserted in the poll book as a candidate, or receive votes for him, although he was proposed and seconded at the election, and was duly qualified: that the defendants, *or some of them*, were not duly qualified in point of property, which the returning officer held to be immaterial, treating the election as one coming under the statutory provision applying to cases where there are not more than two persons in the township for each seat having the property qualification required by law, whereas in fact there were more than the requisite number of persons in the township possessing the necessary qualification.

*J. B. Read* shewed cause, and cited *Regina ex rel. Ritson v. Perry* 1 P. R. 237; *Regina ex rel. Carroll v. Beckwith*, *Ib.* 278; *Regina ex rel. Telfer v. Allan*, 215, 218.

*Morris*, *contra*.

ROBINSON, C. J., delivered the judgment of the court.

Upon the first objection, the opinion of the learned judge of the County Court is supported by the case cited, of *The Queen ex rel. Ritson v. Perry et al.* (1 P. R. 237), and this is so far a case more favourable for the defendants, that it is shewn and not denied that the returning officer had here the original roll: that is, the assessor's roll as revised, and of which the collector's roll ought to be a copy, and we may assume was. Then it is shewn also that he publicly announced that he intended to proceed with the election, using this original roll, and that no one objected. In all such cases, however, the returning officer ought to proceed as the act points out, if it were only for the sake of excluding objections such as have been made here, which, though they may not be treated as fatal, yet put the parties elected, and sometimes the returning officer himself, to a great deal of trouble and expense, which by simply conforming to the statute would be avoided.

The other objections, we think, were not intended to be pressed; we mean were not intended to be revived here.

They were rightly determined, it seems, by the judge of the County Court, according to the evidence.

Rule discharged.

## HEARLE V. ROSS ET AL.

*Ship-owners—Common Carriers—Accidental Fire—26 Geo. III., ch. 86.*

The owners of ships which are engaged as general traders are liable as common carriers, equally with those whose vessels only carry goods between certain named places.

Defendants seeking to avail themselves of the Imperial Act, 26 Geo. III., ch. 86, need not aver that they are British subjects.

*Declaration.* First count—That the defendants being common carriers of goods for hire, the plaintiff delivered to them as such common carriers, and they as such received from him, certain goods of the plaintiff, to wit, &c., to be carried by them for the plaintiff from Montreal to Hamilton, and there to be delivered by them to the plaintiff, for reward to them in that behalf; yet the defendants, whilst they had the goods for the purpose aforesaid, did not take due and proper care of the same, but wholly neglected to do so, and so carelessly, negligently, and improperly carried the same, and took such bad care thereof, that by their negligence, carelessness, and improper conduct in that behalf, the said goods became and were damaged and destroyed, and were lost to the plaintiff.

*Second count*—That the defendants being common carriers of goods for hire, the plaintiff delivered to them as such common carriers, and they as such received from him certain common carriers, and they as such received from him certain goods of the plaintiff, to wit, &c., to be carried by them for the plaintiff from Montreal to Hamilton, and there to be delivered to the plaintiff, for reward to the defendants in that behalf; yet the defendants, although a reasonable time for that purpose has elapsed, have not yet delivered the said goods to the plaintiff at Hamilton or elsewhere, and the same have, by reason of the defendants' negligence and carelessness in that behalf, become wholly lost to the plaintiff.

*Second Plea*—That they, the defendants, are carriers by water from Montreal aforesaid to Hamilton aforesaid: that the plaintiff shipped the goods and chattels in the said declaration mentioned on board of a certain steam vessel of the defendants, called the "Tinto," for the purpose of being conveyed by water by the defendants from Montreal aforesaid to Hamilton aforesaid; and the defendants further say



that within a reasonable time after the said goods and chattels were so shipped as aforesaid, the said steam-vessel, being then in good order and condition, proceeded on her voyage from Montreal aforesaid to Hamilton aforesaid, having the said goods and chattels on board, and before sufficient time had elapsed for the delivery of the said goods and chattels at Hamilton aforesaid, and whilst the said steam vessel of the defendants was on her way there, and had reached lake Ontario, a fire happened in and on board the said steam vessel, without any wilful negligence, carelessness, default, or misconduct on the part of the defendants, or the master of the said steam vessel, or any of the defendants' mariners, servants, or agents, by which said fire the said steam vessel called the "Tinto," and the said goods and chattels in the said declaration mentioned, were without the wilful negligence, carelessness, or default of the defendants, or their mariners, or servants, destroyed; and so the defendants say that for that cause and no other, they, the defendants, were unable to carry and deliver over said goods and chattels in the declaration mentioned, as they, the said defendants, otherwise would have done.

*Demurrer*—That the said plea confesses that the goods in the declaration mentioned were not delivered to the plaintiff by the defendants as they should have been, and yet it does not state any legal excuse for such non-delivery. That the said plea either confesses that the defendants are common carriers, and states no legal excuse or defence for the non-delivery of the goods, or it is an argumentative denial of their being common carriers, and of the allegations of negligence and non-delivery stated in the declaration. That it does not traverse the allegations of the plaintiff of the defendants being common carriers, and of their negligence and their non-delivery of the goods, nor does it confess and avoid them. That it is repugnant, inasmuch as in one part it admits that the defendants are carriers by water, and that they received the goods to be conveyed by water from Montreal to Hamilton, and yet in another part it sets up as an excuse for the non-delivery thereof the accidental burning of the goods, which is no defence under the circumstances

admitted in the former part of the plea ; and that no certain issue can be taken on the said plea.

*Brough*, for the demurrer.

*Richards*, contra, cited *Torrance v. Smith*, 3 C. P. 411 ; *Hunter v. McGowan*, 1 Bligh 473 ; *Crouch v. London and North Western R. W.*, 14 C. B. 255 ; *Morewood v. Pollok*, 1 E. & B. 743.

ROBINSON, C. J., delivered the judgment of the court.

In *Laveroni v. Drury* (8 Ex. 170) Chief Baron Pollock states thus the general principle of law in regard to the liability of owners of vessels "By the law of England the master and owners of a general ship are common carriers for hire, and responsible as such. This, according to the well known rule, renders them liable for any damage which occurs during the veyage, except that caused by the act of God or the Queen's enemies. They, however, almost universally receive goods under a bill of lading signed by the master ; and in such case the liability depends upon and is governed by the terms of the bill of lading, it being the express contract between the parties,—the owner of the goods on the one hand, and the master and owner of the ships on the other. The exception contained in the English bills of lading, which is to be assumed to be in the bills of lading in the present case, will be found in "*Abbott on Shipping*," page 280, and is as follows : "The act of God, the Queen's enemies, *fire*, and all and every other danger and accidents of the seas, rivers, and navigation of what ever nature and kind soever, save risk of boats, so far as ships are liable thereto, excepted."

We think the plaintiff properly declared against the defendant as common carriers, though before the case of *Morse v. Slue* (1 Ventr. 190, 238) it had not been settled in the courts in England that ships engaged as general traders, and not undertaking to transport merchandize regularly from one certain place to another, were under the strict liabilities of common carriers ; and even since that case it has been a point on which the American courts have differed, though I take it that the decision of *Morse v. Slue* has in England been consistently adhered to.

In this case, besides, the defendants admit their liability as common carriers in a general sense, and by not traversing the allegation that they received the goods on that footing.

Then as common carriers they would be liable for a loss of goods by an accidental fire, unless in the case of destruction by lightning. They do not seem to have protected themselves in this case by making an exception of accidents by fire in the bill of lading, which is not unusual here, and has been usual in England before the statute, and notwithstanding the statute.

So the defendants rest their case solely upon the English statute 26 Geo. III., ch. 86, which statute has been already decided in the Court of Common Pleas, in *Torrance v. Smith* (3 C. P. 411) to be in force in this province, and no doubt correctly.

This leaves only the question whether the plea is sufficient, without containing an averment such as was contained in *Morewood v. Pollok et al.* (1 Ell. & Bl. 747) that the defendants are subjects of the Queen. We see nothing in the statute 26 Geo. III., ch. 86, sec. 2, that should make such an averment necessary. The language is as unrestricted and general as possible, "that no owner or owners of any ship or vessel shall be subject or liable to answer for or make good any loss or damage which may happen to any goods or merchandize whatever, which shall be shipped, taken in, or put on board any such ship or vessel, by reason or means of any fire happening to or on board the said ship or vessel."

It is true that the motive to the act is declared to be to promote the increase of ships and vessels, by relaxing the rigour of the common law, which threw the loss upon the ship-owner under such circumstances. But we must suppose that parliament thought it just as between the ship-owner and the shipper of cargo that this relaxation should take place, otherwise they would be encouraging the ship-owner at the expense of the merchant. And besides, governing ourselves by analogy with the course which has been always taken in this province in regard to the statute 5 Geo. II., ch. 7, passed for the advantage of British creditors, we could not hold it indispensable, in order to entitle a suitor to the benefit of

this statute, that he should in the first instance shew himself to be a British ship-owner.

We think the plea as it stands is a good defence, and that judgment must be given for the defendants.

Judgment for defendants.

### CORNWALL V. MURPHY.

*Agreement—Construction of—Lease or agreement for lease—Immaterial issue—Pleading.*

Plaintiff declared that defendant having leased to him certain premises, undertook to make certain improvements, but failed to do so. Defendant pleaded that he did not lease as alleged. The instrument when produced appeared not to be a lease, although it was so called in the writing. *Held*, that the plea should be taken as in effect a denial only of the writing as set out, and that the plaintiff was entitled to succeed on the issue. *Held*, also, that the plea offered no defence, the existence of a term not being essential to the right of action,

*Declaration*—That the defendant, on the 3rd of September, 1856, having leased to the plaintiff a certain lot of land (describing it), agreed to have the building erected for a store and dwelling-house on said lot so leased completely finished and ready for occupation for the plaintiff by the 15th of October, 1856, or in default thereof to pay the plaintiff £10 per week for every week while the said building should remain unfinished: that the defendant did not finish and have ready for occupation the said building by the said 15th day of October, but therein made default, and the plaintiff has lost and been deprived of the use and benefit of the said building from the said 15th day of October.

*Pleas*—1. That the defendant did not agree as alleged. 2. That he did finish and have ready for occupation the said building in manner and at the time agreed. 3. That he never leased the said land as alleged.

The plaintiff took issue on all these pleas.

The case was tried at Niagara before *Burrs, J.*, and a verdict rendered for the plaintiff for £90, being £10 a week for nine weeks, during which he was deprived of the premises, subject to the opinion of the court on the question raised by the third plea, whether the instrument proved entitled the plaintiff to succeed on that issue.



The following is a copy of the instrument:—

Agreement made the third day of September, A.D. 1856, whereby Thomas Murphy, of the Town of Clifton, in the County of Welland, Carpenter and Joiner, did grant, bargain, sell, lease, and let to hire to Vincent Cornwall of the City of Hamilton, Gentleman, Lot fronting on Park Street in the said Town of Clifton, bounded on the West by Michael Walshe's Lot, and on the East by Patrick Duffy, and the said Thomas Murphy agrees to have the Store and Dwelling-house completed by the fifteenth day of October, 1856. Rent of both buildings and said land to be One Hundred Pounds. Lease to be for five years, with privilege of Lessee to surrender at end of first year during the said term. If any part of said Store or Dwelling-house is unfinished by the 15th day of October, or any difficulty interferes by way of preventing said Cornwall from entering on said day, the said Murphy shall pay to said Cornwall, his Executors, Administrators or Assigns, the sum of £10 per week during such time.

If said Cornwall shall totally refuse to take said property on such terms, he shall pay Twenty-five Pounds to said Murphy.

Dated this 3rd day of September, 1856.

(Signed), VINCENT C. CORNWALL.  
(Signed), THOMAS MURPHY.

Witness,

(Signed), ADAM FERRIE, JR.

*Richards*, for the plaintiff, cited *Tress v. Savage*, 4 E. & B. 36; *Lee v. Smith*, 9 Ex. 662; *Doe Davenish v. Moffat*, 15 Q. B. 257; *Oxley v. James*, 13 M. & W. 213; *Doe Egremont v. Burroughs*, 8 Jur. 954.

ROBINSON, C. J., delivered the judgment of the court.

This case comes before us upon a point reserved at the trial; namely, whether upon the evidence a verdict should be entered for the defendant on the third plea.

The instrument set out is not perhaps in strictness a demise. It purports to be for five years, and is not under seal, and as the law now is, a term of five years cannot be created but by deed; but then by the terms of it the lessee or intended lessee was to have the privilege of giving it up at the end of the first year, so that it may be contended that the instrument, such as it is, does not profess to create a

term certain for a longer term than the one year, which may be done without deed. If we look, however, at the language of the deed, it is plain that the intention was not to constitute by it the actual relation of landlord and tenant. A day was named when the proposed tenant might take possession. By that day the defendant (the owner of the property) was to have certain improvements made, or to pay £10 a week for whatever time he should be in default after that.

The plaintiff had on his part an option reserved to him to retract on or before the day named, in which case he was to pay the defendant £25 as a compensation for the disappointment. While things were in this state there was in strictness no legal term existing. Still both parties in the writing call it a lease, while the language they were using showed that it was no lease. The defendant says in the writing that he had granted, bargained, sold, *leased* and let to hire, while the rest of the writing shews that neither of them could mean any thing more than that they had made an agreement about leasing.

When the plaintiff says in his declaration that the defendant *having leased* to him, &c., undertook to make the improvements, he only used the word in the sense in which they had both used it in the writing.

The existence of a term was not indispensable to the plaintiff's right of action. The claim is not founded on the relation of landlord and tenant, but on an agreement entered into preparatory to that relation, and with a view to its taking place afterwards; and it appears to us that we should look upon the defendant as using the word "lease" in his plea, in the same sense only as he had used it in the writing, and as meaning, therefore, only to traverse the instrument as set out in that sense; in other words, to deny the writing.

The learned judge at the trial noted that it was to be left to the court to say whether the instrument constituted a lease; and if not, *if that would decide the matter in favour of the defendant*, then that a verdict should be entered for him on that plea; by which we understand it to be meant that the plaintiff need not go through the form of moving

for judgment *non obstante* on the ground of immateriality of the issue.

Taking the case upon that footing, we have no hesitation in determining that the verdict should be entered for the plaintiff on the third plea, as well as on the others; and at any rate we think it would have been right to say to the jury at the trial, that in finding upon that plea they should consider the defendant as only meaning to deny the leasing in the sense in which the word had been used in the writing.

Judgment for plaintiff.

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### RYCKMAN V. RYCKMAN.

*Dower Demand and refusal Evidence of readiness to assign—13 & 14 Vic. ch. 58, §sec. 5.*

**DOWER.**—*Plea, tout temps prist. Replication, a demand and refusal. Rejoinder, denying the refusal.* There was no suggestion that the husband died seised. The evidence shewed that the tenant had frequently offered the demandant her dower, and to leave it to two persons to stake out the land, but she declined, saying that she could not work the land and would rather have compensation, and no portion was in fact marked out. *Held*, that the issue must be for the tenant.

As the husband did in fact die seised.—*Seemle*, per *Burns, J.*, that that should have been suggested on the record, and the tenant would then have been entitled to damages from the suing out of the writ, and consequently to costs.

**DOWER.**—The demandant claimed dower in certain lands, as the wife of Tobias Ryckman, deceased, not averring that he died seised, nor claiming damages.

The tenant pleaded that from the death of the husband, he hath been always “ready, and still is ready to render to the demandant her dower, and rendereth the same here into court.”

The demandant replied that more than one month, and less than one year before the commencement of this suit, namely, on the 2nd of August, 1855, she demanded from the tenant her dower, &c., but that he did not render it, and wholly neglected and refused so to do, wherefore she prays judgment to recover her dower aforesaid in the lands, &c., and also damages for the detention thereof.

The tenant rejoined that he did not refuse to render her

dower to the demandant, in manner and form as alleged in the replication, concluding to the country.

At the trial, at Cobourg, before *Hagarty*, J., it was proved that in July, 1855, the demandant served a written demand of her dower, pursuant to the statute. The action was brought on the 28th of February, 1856.

The tenant had frequently stated to the demandant and her attorney his willingness to give dower, offering her possession of one-third of each field and of the house, and telling her that he would name a person, and she could name another, and she might come any day she wished, and they should stake out the land for her. Her attorney was present when such offer was made to her.

She was told, soon after her husband's death, that she might have her living so long as she would live in the house of Munsen Ryckman, the tenant of one portion of the property, and one of her husband's sons (she had been married to Tobias Ryckman about two years before his death). She was told also by the tenant "here is the land, one-third of it is for you, you can rent it to any one or live in the house." She said she did not want the land, as she could not work it; that she would rather have something else.

She was requested not to go away till the matter was settled, and on behalf of all the heirs an offer was made to leave it to two persons to stake out the land, but she repeated that she could not work it, and would rather have something else. She was told that whatever third the law would give her was ready for her.

Soon after the notice was served of the claim in July she came again to the land, and was again told that the third was ready for her, and she was requested to name a person on her behalf to measure it out. But no portion for her was ever in fact marked out.

The learned judge, by consent of parties, directed the jury to find for the demandant, with one shilling damages, in all the actions, subject to the opinion of the court upon the evidence, whether, drawing such inferences from the evidence as they might think right, the demandant or the tenant in each action might succeed upon the issue joined, the court to let



the verdict stand for demandant, with or without damages or to order a nonsuit, according to their opinion.

*J. D. Armour*, for demandant, cited *Bishoprick and Wife, v. Pearce*, 12 U. C. R. 306 ; *Quin v. McKibbin*, *Ib.* 323.

*O'Hare* shewed cause.

ROBINSON, C. J.—I cannot distinguish these cases from that of *Bishoprick and Wife v. Pearce*, referred to in the argument (12 U. C. R. 306.) We are bound, I think, to give effect to our statute 13 & 14 Vic. ch. 58. sec. 5, according to the evident intention of the legislature in making the provision, which was that the tenant should not be subject to costs in case of dower, unless the demandant was driven to sue for it. If she brings her action when she need not—that is when her right is not disputed, and when the tenant has been willing to give her all she is entitled to without an action—then the statute protects the tenant against paying costs unnecessarily incurred. Here the tenant has pleaded no false plea, made no unjust defence, and shewn no disposition, before or since the action, to dispute the claim to dower. The only thing to be done therefore was to set out the land for the occupant to occupy.

This the tenant could not do alone, because he was not to be the sole judge in the matter. He offered to join in appointing persons to mete out the dower, but the demandant, according to the evidence, declined to take part in the measurement by appointing some one to act for her: she would take no interest in the matter, not caring about the land, as she said, but wanting money instead.

I do not see how the jury could have found upon their oaths that the tenant in this case had *refused* to render her dower, and that was the only issue raised upon the record.

The verdict, I think should be in favour of the tenant on the issue, which will not interfere with the demandant taking judgment for her dower.

BURNS., J.—This case differs from the case of *Bishoprick v. Pearce* and *Quin v. McKibbin* in the facts. The record,

so far as the tenant pleading the plea of *tout temps prist*, and the demandant replying a demand of dower and refusal by the tenant, presents the case the same, but the evidence shews that in the present case the husband died seised of the premises, and the tenant was in possession by operation of law. The record does not shew or suggest that the husband did die seised, and therefore it cannot be ascertained by the record whether it is a case in which the demandant would be entitled to costs as well as damages, irrespective of our statute. The pleadings seem to me sufficient to raise both questions—namely, whether the demandant is entitled to damages and costs, or costs only, if it be a case where she is not entitled to damages. In either case the demandant upon this record was at once entitled to her judgment for seisin of her dower, and there was no occasion to have taken down the case to *nisi prius* in order to have obtained the writ of *habere facias seisinam*. It was only necessary to go down to trial for the purpose of determining the issue, with a view to see whether the demandant was entitled to recover damages as well as costs. The tenant in this case coming into the possession at the death of the husband, was not a wrong-doer as against the demandant until she demanded her dower and he had refused to give it to her. Therefore the plea of *tout temps prist* in this case was a proper plea on the part of the tenant, but I do not think the effect of the plea is to admit the right to damages. If the demandant's count had stated that the husband had died seised, the effect of the plea then might possibly be to admit the right to damages, but that point is not in question on this record. I think the application of what my brother Draper said in *Bishoprick v. Pearce* has been misapplied in this case. When he quoted from *Bac. Abr. "Dower" D. 2*, that notwithstanding the heir had pleaded *tout temps prist* the demandant would be entitled to recover damages from the teste of the original writ to the execution of the writ of inquiry, he must be understood to have meant upon a record properly framed for the purpose. In *Hargrave's Notes to Coke on Littleton*, 32 *b*, it is said, speaking of how the inquiry shall be of the dying seised and damages, "If judgment be by confession

or default, a writ shall issue to deliver seisin and inquire of damages; but if it be by verdict, the same jury shall inquire of the dying seised and damages; but if it be omitted it may be supplied by writ of inquiry." The damages are—1. The value *de tempore mortis*; 2. *Damna occasione detentionis dotis*, though if they are mixed up together by the verdict yet it will be good. Now if the tenant's plea of *tout temps prist* be true, one can see no reason, though the demandant may be entitled to recover the value of the third part from the suing out the writ, why he should be subject to the second class of damages. Then with regard to the first, I find, upon looking into the cases in Viner's Abridgment, in all cases where the tenant pleads *tout temps prist*, and the demandant replies to it, there should be a suggestion that the husband died seised, and then the jury would be sworn upon the issue not only to try it, but to inquire of the dying seised and the damages. Upon the record so framed the jury might find the plea for the tenant, and yet assess the value or profits from the suing out of the writ to the time of the inquiry, for it is said that upon the plea of *tout temps prist* being put in, and the demandant taking issue upon it, the damages shall await the event of that issue, and the demandant cannot in this case take judgment and pray a writ of inquiry—Roscoe on Real Actions, I. 310. The suing out of the writ is of itself a demand of dower, and if the tenant pleads *tout temps prist*, and the demandant confesses the plea, she is at once entitled to her writ of *habere facias seisinam* without damages; but if she contests the truth of the plea, her right to damages is suspended till the trial of the issue; and as the plea of *tout temps prist* admits the right to dower, she may be entitled to damages from the suing of the writ, as a demand of her dower, though she fail upon the issue she has tendered upon the tenant's plea. My brother Draper seems to have thought that the heir would be subject to costs where damages were assessed, even though he succeeded on the plea of *tout temps prist*, under the operation of the statute of Gloucester. I am not prepared to assent to that proposition. It was not necessary to determine that point in the case of *Bishoprick v. Pearce*, nor is it necessary to do so in

this case, as the record is not framed suggesting a case that would entitle the demandant to have damages assessed, even from the suing out of the writ. I see in a note to page 321 of the first volume of Roscoe on Real Actions, that it is made *acquere* whether, when the tenant saves himself from damages on a plea of *tout temps prist* he is liable to costs. In this case the demandant has omitted from the record the matter which entitles her to an enquiry respecting damages, and consequently costs, and has gone to trial simply upon the truth of the tenant's plea. If she contends that it is worth her purpose to apply for a writ of enquiry as to the value since the writ was sued out, she can apply for a writ of enquiry, and then the question of costs would properly arise, if any sum were found that she would be entitled to recover.

In Park on Dower, 307, it is said, "the statute of Merton, in giving damages, has left the method of ascertaining them to the court; and the usual practice is, unless the damages are either admitted by the party, or ascertained by the jury who try the action, to grant a writ of enquiry; and if judgment is given for the demandant by default, confession, or any other way than by verdict, there must of necessity be a jury impannelled to assess the damages." For the reasons which I shall presently give, I think we can give no judgment in the demandant's favour on the plea, but the contrary, that upon the plea judgment could be given to the tenant; and therefore, if the demandant shall contend that she is entitled to the costs of suing out and serving the writ, she must proceed to have damages assessed in her favour for something. The question will then arise whether the 5th section of the Dower Act of 1850 is to be applied to cases where the action is brought against the heir, and compel the demandant to serve him with a notice a month before the bringing of the action, as in case where she would (to entitle herself to costs) do against any other person, where her husband did not die seised.

On examining the evidence given in this case, it is quite clear that the tenant, from the time of the death of the demandant's husband down to the bringing of the action, was always ready and willing to have assigned the dower to



the demandant, but she always refused to take the land. She avowed that her object was to compel him to make some money compromise respecting it, and that she did not want the land. I met with a case in Viner's Abridgment "Dower" Ma., 37, page 282, very applicable to this. The tenant pleaded *tout temps prist*: the demandant replied that she had, at a particular time, demanded the dower, and that the tenant had refused; and in answer to that the tenant rejoined that he had, at the time mentioned, appointed a time, and requested the demandant to come upon the land, and that he would give her the dower, but that she refused. The court adjudged that it was a good answer of the tenant.

It appears to me the tenant is entitled to a judgment upon these pleadings and the evidence, and that the verdict should be entered for him, leaving the demandant to have her judgment for seisin, without damages, or to take such other course as she may be advised.

McLEAN, J., concurred.

Judgment for tenant.

## REGINA V. BOULTON.

### *Lane—Dedication—Highway.*

Where a person has sold lots according to a plan on which a lane is laid out in their rear, he cannot afterwards shut up such lane; and the fact that he had previously conveyed portions of the land comprised in the lane, would only affect so much as he had thus precluded himself from giving up to the public, and would not entitle him to close up the whole.

INDICTMENT for nuisance for obstructing a common public highway, being a lane on the north side of King Street, and running parallel with it, connecting York Street with Simcoe Street.

At the trial, at Toronto, before *Robinson, C. J.*, the jury found a verdict of guilty, and the learned Chief Justice reserved for the opinion of the court the question whether the evidence supported the conviction. Sentence was not passed.

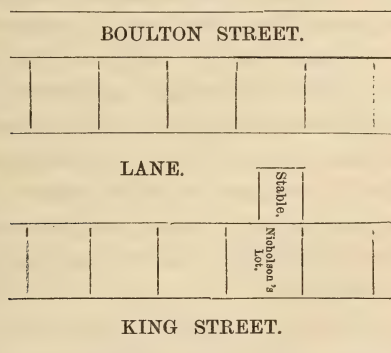
The facts were as follow:—The defendant owned a block of land on the north side of King street, extending from York street to Simcoe street, and many years ago he laid

out a lot fronting on King street, and running back 100 feet. This lot he sold to one Nicholson, who long ago built a wooden stable upon it, which he placed upon the extreme northern limit of his lot.

Afterwards the defendant laid out the north part of his block into building lots, and left a lane of about twenty feet (there was no accurate account of its width) which was to extend some distance between York street and Simcoe street, and was to separate the range of lots fronting upon King street from a range of lots north of that, which the defendant intended should front upon a street to the north called Boulton street.

This plan of survey gave to the range of lots fronting upon King street a less depth by some feet than had been given to Nicholson's lot; and as the defendant had conveyed that lot, and Nicholson had placed his stable as far back as he could, the lane could not be laid open in that part of the same width as it was and now is east and west of it.

In the plan which the defendant deposited in the County Registry Office, the lots and the lane were exhibited thus. The plan was certified and filed in 1852 :



It was sworn by Mr. Crooks, the prosecutor, that he became the purchaser of Nicholson's lot in February, 1854; that north of the stable, and between it and the range of lots butting on the lane, there was a space wide enough for a lumber-waggon to pass, with some room to spare; that he had used it for that purpose, and the space had always been left open in rear of the stable or shed, until the defendant

shut it up by running out a board fence from each end of the stable to the northern edge of the land; that there were many persons living on the lots east and west of that point, on each side of the lane, which opens into a street at each end: that about eighteen months ago defendant closed it at this point: that some one living near the place pulled down the fence which the defendant had put up, and it was renewed and pulled down again, and the defendant replaced it; and the prosecutor, Mr. Crooks, again pulled it down in presence of two policemen, and afterwards preferred the indictment for nuisance, in order to have the right of way determined.

Mr. Crooks swore that before he purchased he referred to the registered plan, in order to ascertain whether he would have a passage-way behind his property, and that it was at that time open, though it seemed that when the plan was filed it was fenced across from the stable to each end, or at least it had been fenced and *some* of the boards were still up.

Charles McClellan, the city inspector, swore, that in 1856 he made a report of a nuisance (rubbish or water) allowed to lie in that lane, the party in the space between the stable and the north side of the lane: that an investigation took place before the police magistrate, upon a complaint preferred by the witness against the present defendant as proprietor of the ground: that the defendant attended, and insisted that he was not bound to remove the nuisance, for that it was in a public highway, and it was the business of the public to see that the road was kept in repair.

This witness swore that the space north of the shed was about eight feet wide, and that it had been long used as a thoroughfare before it was fenced across, about May, 1856.

Mr. Gurnett, the police magistrate, produced the information which the city inspector spoke of, and stated that Mr. Boulton appeared and defended himself; that he contended the lane was a public highway, and that he was not bound to put it in order. He referred to the statute which provides that streets and lanes laid out by private proprietors in towns shall be looked upon as public highways. That he, Mr.

Gurnett, thought the defendant was right in what he contended for, and dismissed the complaint against him. The city authorities in consequence put the lane in proper order.

On the part of the defendant, John O'Brien was called as a witness. He swore that he was a tenant of the defendant, living on the lane behind Nicholson's (now Crooks' lot); that he had known the lane for six years; that when Mr. Crooks bought it it was stopped up; that when the witness first saw it, it was fenced from each end of the shed to the north side of the lane; that the witness's lot, which was on the north side of the lane, was 84 feet deep; that is, running southerly towards the lane for that distance; and that, giving him his eighty-four feet, there would be only two feet left between him and the shed. In other words, if he had his complement there could only be a passage at that point two feet wide.

He said that the lane was closed up at that point till Mr. Crooks became the owner of the Nicholson lot; that is, part of the board fence was up, though there might have been some boards off, but Mr. Crooks insisted on its being laid open.

The parties put in a written admission of certain facts; and it was explained that the real ground of the dispute was, that the defendant desired that Mr. Crooks should move his stable back, so as to leave to the lane its full width, in which case he would not object to that part remaining open, which he now insisted he had a right to close; and till Mr. Crooks consented to that, the defendant objected to giving up the ground in question for a road, unless he was paid for it.

Mr. Crooks, on his part, contended that by his plan filed Mr. Boulton had dedicated the lane to the public, and that if there were a few boards across the street when he filed his map, it would not the less be a dedication, as shewn in the plan, and that he was bound to leave as much of the lane open as was in his power, and to leave that part open which his plan exhibits as open space, whether it be much or little.

*R. A. Harrison*, for the crown, cited 9 Vic., ch. 34, sec. 33; 12 Vic., ch. 35, sec 43; 13 & 14 Vic., ch. 15; *Poole v.*



Huskins, 11 M. & W. 827; Belford v. Haynes, 7 U. C. R. 464; Reginia v. Spence, 11 U. C. R. 31.

*The defendant in person, contra.*

ROBINSON, C. J., delivered the judgment of the court.

Independently of the statutory provisions of this province respecting streets laid out on blocks of land in towns and villages owned by private proprietors, we are of opinion that the defendant in this case having made and registered a plan, and sold according to it, which plan exhibits a lane or passage in rear between those lots fronting on King street and those fronting on Boulton street, he would, upon well known principles, be precluded from resuming exclusive possession of the land, and excluding the public from the use of such lane. What the defendant had laid down on his plan as lane was apparently of sufficient width to be used by horses and carts, as well as by foot passengers; but if limited to foot passengers, it would still be a great accommodation. It is alleged by the defendant that whatever the plan may seem to hold out, he cannot in fact concede to the public a lane of more than three or four feet in width for that by his grants made to vendees before he filed his plan, he had entitled them to come so far south from Boulton street as not to leave more than that inconsiderable space between the rear of their lots and the rear of the lots which front on King street. To make that argument apply, it would be necessary at least to shew those alleged grants on Boulton street, that we might see the terms of the description contained in them; and to prove also at what time they were made, so that it might be seen whether they were before or after that had taken place which is relied on as a dedication. No evidence for this purpose was given, but if it had been, it could only have been material in regard to so much of the land as it would appear the defendant had precluded himself from dedicating as a highway. He could not be entitled to close up the whole lane because he had led those who purchased from him to expect that they would have a wider lane than there was room for; and so, also, as to

what is shewn respecting the particular part of the lane marked in the plan: we mean the part opposite to Nicholson's lot. The plan does exhibit the stable, which is in the rear limit of that lot, as jutting out into the lane, so as to obstruct more than half of its width. The defendant, it does seem, cannot remedy that, and by the plan, the public can see what the fact is in that respect. But though it be true that the defendant could not give the advantage of a lane as wide there as it may be on either side of the stable, yet the public are not the less entitled to have so much of the lane left open as Nicholson's lot does not occupy.

We think the evidence supported the conviction, for that the defendant is bound to leave the passage open so far as he legally can; and if it be only two feet wide, it might still be a desirable convenience as a passage-way for foot passengers.

Conviction affirmed.

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### BRENNAN V. WHITLEY.

*Covenant—Action by assignee—Evidence—Amendment.*

Plaintiff declared that defendant, by his deed, covenanted not to commit waste, not stating with whom the covenant was, or who were the parties to the deed:

*Held*, that the plaintiff could not shew that he was suing as assignee of the reversion, but must prove a covenant with himself; and an amendment was refused at *nisi prius*.

The plaintiff sued in covenant, setting forth that defendant, by his certain deed in writing, bearing date the 23rd of June, 1851, did, amongst other things, covenant that he should not nor would, at any time during the term granted by said deed, commit, or permit, or suffer to be done, any wilful or voluntary waste or spoil in or upon said premises, or any part thereof; and then the declaration charged the defendant with having cut and carried off timber, contrary to his covenant.

It was not stated expressly in the declaration who were the parties to the deed, nor that the defendant by the deed covenanted with the plaintiff; but there was no intimation whatever of the plaintiff suing as assignee of the reversion,

nor any explanation given why he should sue upon it unless he was the coventantee.

The defendant pleaded *non est factum*. The lease produced upon the trial, which took place at Toronto, before *Robinson, C. J.*, was made by George Brennan to the defendant, and it was shewn that he had by deed conveyed his reversion in the land to the plaintiff, John Brennan.

It appeared to the learned Chief Justice that he could not admit evidence of an interest in the plaintiff which was not stated in the declaration ; that from the record he could only understand that the plaintiff was suing as upon a covenant entered into with himself, for otherwise he could have no more connection with the cause of action, for anything that was stated, than any stranger. He held that the issue put the plaintiff to prove a demise made by himself. The plaintiff then moved to be allowed to remodel his declaration, so as to make it an action by him as an assignee, upon a covenant running with the land.

The learned Chief Justice declined to allow the amendment, and the plaintiff was nonsuited.

*Blevins* obtained a rule *nisi* to set aside the nonsuit as contrary to law and evidence, or for a new trial, on the ground that the amendment ought to have been allowed.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the nonsuit was proper, and that the court has no discretion to review the decision at *nisi prius* refusing the amendment ; but we allow a new trial on payment of costs, with liberty to amend the declaration on paying the costs occasioned by the amendment.

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#### WANLESS V. MATHESON AND BLAIR.

*Malicious arrest—Evidence of reasonable and probable cause.*

*Held*, that under the evidence stated below, the plaintiff clearly failed to shew want of reasonable and probable cause, and that a nonsuit should be entered.

ACTION for malicious arrest, tried at London before *Richards, J.* *Plea*, by each defendant, "not guilty." Verdict for plaintiff for £50.

*McMichael* obtained a rule *nisi* for a nonsuit on leave reserved, or for a new trial on the law and evidence, and for reception of improper evidence.

*Fitzgerald* shewed cause, and cited *Torrance v. Jarvis*, 12 U. C. R., 120.

The facts of the case fully appear in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that, upon the leave reserved at the trial, a nonsuit should be entered. It was proved very clearly that the plaintiff was overwhelmed with debts, which he was unable to pay: that there were mortgages and judgments recorded against him: that he had assigned his personal property; and that the executions which were out against him were returned "no goods." He had broken faith with the defendants in the arrangements which he made with them; he had deceived them with promises which he had not performed, and by making statements in regard to his circumstances which were found to be incorrect.

There were rumours very generally prevalent that he had absconded, and others that he was immediately about to abscond, which rumours, undeniably prevailing, the defendant was told by his legal adviser well warranted an arrest.

It would be, we think, a great reproach to the administration of justice, if when the law of the land expressly allows a debtor to be arrested, a creditor acting upon such grounds as these defendants did, should be treated as having acted without reasonable ground and maliciously.

If persons acting on such grounds are not safe from vindictive damages, there ought certainly to be no power given by law to arrest for debt, for what the law intends to be an advantage to the creditor would be nothing but a snare.

It would amount to this: that the creditor must wait till his debtor has not only completed his arrangements for a flight, but till he has actually fled from his house, and is making his way with all speed to a foreign country, and must take his chance of overtaking him on his way.

The plaintiffs in this case owed the defendants £800 or £1000 for a steam engine which he had purchased from



them. He had stripped himself of all means of paying the debt ; had trifled with and deceived them ; and the general report and impression was, that he had actually absconded, though the defendants, having informed themselves more correctly as to his movements, found that if they lost no time they might yet possibly be able to stop him and obtain satisfaction or security.

We are of opinion the rule should be made absolute.

Rule absolute.

### DAVIS V. BOWES ET AL.

*Limited partnership—Interference by special partner—Evidence—12 Vic., ch. 75.*

Where defendants are charged as general partners, having become so liable by intermeddling in a firm of which they were originally special partners, it is not necessary for the plaintiff to shew that the limited partnership was regularly formed under the statute.

*Held*, that in this case the evidence of interference was sufficient to establish defendants' liability.

This action was brought upon a Bill of Exchange for £75, dated 1st January, 1855, drawn by one John H. Greer upon the firm of D. Bethune & Co., payable to his own order on the 1st of December then next. The bill was endorsed to the plaintiff, and the declaration charged the defendants as being acceptors thereof under the acceptance by the name and style of D. Bethune & Co.

The defendants pleaded that they did not accept the bill.

At the trial at Hamilton, before *Burns, J.*, the facts proved were as follow : One of the shareholders in the firm of D. Bethune & Co., was called as a witness, and he stated that the firm was "D. Bethune & Co.," and formed in 1849 or 1850, and that Bethune was the manager ; that the defendants were shareholders in that firm, the witness having conversed with the defendant Bowes, who admitted himself to be a member of the firm : that the business of the firm was that of steamboating : that in the second year of their business the defendants, with others, were elected by the rest to carry on and manage the business, and that there had been no others elected since ; that Bethune left this country for England, and did not return : that after he left, one Holland carried on the affairs and business of the company as the

agent thereof, and being also one of the shareholders in it, and that he was the officer by and through whom the company carried on its business : that the defendant, Morrison, in the second year, assented to being a director of the company, the witness voting for him at a meeting at which Morrison was present ; and in the year 1855, the property of the company was sold and disposed of : that Holland had always been in the habit of drawing and signing bills and notes, and accepting bills, for and on behalf of the company. The witness understood that Holland acted under some power of attorney, but he did not see it ; and that the partnership of all the members was by a deed of partnership under the Limited Partnership Act.

The defendants objected at the trial,

1. That the partnership should be proved by production of a certificate of a deed being filed, &c., to shew who the partners were ; and that the evidence was not sufficient to establish these defendants to be general partners.

2. That the power of Holland should have been produced, in order to shew the authority to him to accept the bill.

On the part of the plaintiffs, it was contended that they had shewn sufficient *prima facie* to shift the burthen of proof, and that it was for the defendants to shew, if they were not liable, that they had entered into a partnership limiting their liability within the provisions of an act which had been passed in their favour, if they came within it, and that it was not necessary for the plaintiff to give such evidence.

The learned judge, in order, if possible, to prevent the case again going to another jury, asked the jury to say,

1st. Whether these defendants were partners in the firm of D. Bethune & Co., in whose name the bill had been accepted.

2ndly. Whether Holland, being a partner in the firm, had authority to accept for the members of that firm.

The jury found both points in the plaintiff's favour, whereupon the learned judge directed a verdict to be entered for the plaintiff, and reserved leave to the defendants to move the court to enter a nonsuit on the points taken if sustainable.

*Burns* obtained a rule to shew cause why the verdict should not be set aside, and a nonsuit entered, pursuant to the leave reserved, or why there should not be a new trial, the verdict being contrary to law and evidence.

*Freeman*, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We think the evidence in the case was quite sufficient to prove these two defendants to be associated with others as general partners in carrying on business as owners of steam-boats, under the name and style of Donald Bethune & Company.

It was sworn that five persons, of whom the defendants were two, were with their consent, chosen directors to manage the affairs of the association in which they had shares, and that such committee so appointed, did manage the affairs of the steam boat company, through one Holland as their agent, who was also himself a stockholder.

It was sworn that in 1855, the property of the company (that is, their boats) was sold by the directors : that after their election those five directors conducted the business, and that Holland, acting under them, was always in the habit of drawing bills, notes, &c., and accepting them in the name of the firm, whose business the five directors, including the two defendants, were appointed to manage, and did manage.

It was left to the jury to say whether they were satisfied that both these defendants were partners, trading under the firm of D. Bethune & Co., and that Holland had authority from them to accept bills. They found both points in the affirmative, and it would have been inconsistent with the conclusions which the court and jury had come to in other cases in which members of this managing committee have been held liable as general partners, if they had found otherwise. (a)

The learned judge was right in considering that there was no necessity that the plaintiffs, before they could recover, should give evidence that the association spoken of had been regularly formed as provided for by the statute 12 Vic., ch.

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(a) See *Bowes & Hall v. Holland et al.* 14 U. C. R. 316 ; *Hutchison v. Bowes et al.* 15 U. C. R. 156.

75, respecting limited partnerships. The 3rd and 14th clauses of that act, taken in connection with the evidence given in this case, shew that the defendants were not, if that evidence was believed, in a position to hold themselves out as special partners merely. It was against them as general partners, and independently of the statute, that the plaintiffs were proceeding. The only question was, whether the evidence was sufficient to warrant the jury in finding them liable as general partners. The jury, under the direction which they received, found them liable as general partners, and as we think upon sufficient grounds. This being so, there could be no object in the plaintiff producing evidence of a limited partnership formed under the statute.

Rule discharged.

### SMALL V. GRAND TRUNK RAILWAY COMPANY.

*Obstruction of navigable river—Right of action—Not guilty, “by Statute”—River Rouge.*

*Declaration*—That the defendants, in constructing their Railway, built a bridge across the river Rouge, so as to impede the navigation; that the plaintiff owned land on the river above the bridge, and by reason thereof was entitled to the free use of the river thence to the lake; that vessels had been accustomed to pass up and down to his land, but could no longer do so; and that the trade of the river had been destroyed, and his land in consequence diminished in value. *Plea*—Not guilty, “by Statute.”

*Held* —1. That the declaration did not state any injury peculiar to the plaintiff, which could entitle him to maintain an action, but that the proper remedy was by indictment.

2. That as the land had been all the time in possession of a tenant, the plaintiff as reversioner could not recover upon the case stated in the declaration.
3. That both these objections were open to defendants under the plea of not guilty, “by Statute.”

The Rouge found to be a navigable river.

PLAINTIFF sued defendants in an action on the case, declaring that the defendants, in constructing their railway through the township of Pickering, had built a bridge across the river Rouge near its mouth, in such a manner as to impede and destroy the navigation of the river from lake Ontario up and down the river, by schooners and vessels; that the plaintiff had been and was then the owner in fee of a large tract of land on or near the bank of the river, above the said bridge, and was and is by reason thereof entitled to the



free use of the river from thence to lake Ontario; that vessels had been accustomed to pass from lake Ontario up and down the river to his land, but could no longer do so by reason of the erection of the bridge; that the trade along the river had been hindered and destroyed, and the plaintiff's land in consequence diminished in value.

Defendants pleaded "not guilty," by statute. The jury found for the plaintiff and five shillings damages, leave being reserved to move to enter a verdict for defendants on certain legal objections taken, which are stated in the judgment.

*Galt* obtained a rule *nisi* accordingly, to which *Eccles*, Q.C., shewed cause, citing *Ward v. Great Western Railway Company*, 13 U. C. R. 315; *Snure v. Great Western Railway Company*, Ib. 376; *Wismer v. Great Western Railway Company*, Ib. 383.

*Connor*, Q. C., and *Galt* supported the rule, and cited *Williams v. Jones*, 11 A. & E. 643; *Tay. Ev. Sec. 295*.

ROBINSON, C. J., delivered the judgment of the court.

We think, if the jury had found the Rouge not to be a navigable river, considering all the evidence, we should hardly have been disposed to question the propriety of that decision. From the frequency of its obstruction at the mouth by a bar, which, when the east wind blows, completely shuts it up, and from their being less water running in it than there used to be when the country was less cleared, it seems to have been almost disused for purposes of navigation for five or six years before the company made their railway.

If it can properly be regarded as a navigable river, then the statute 16 Vic. ch. 37, sec. 20, and 16 Vic. ch. 169, sec. 8, would apply to this case; but as nothing was said of these provisions during the trial or on the argument of the rule, we suppose the Company must have proceeded on the assumption that the Rouge was not a navigable stream. If not, they must for some other reason have omitted to pay attention to those provisions. But as the jury have given a verdict for the plaintiff, which is not moved against on any

other grounds than the legal objections which were taken at the trial, we must take it as having been properly determined in the case, that the river was navigable, and has been wrongfully obstructed by the defendants in the manner complained of in the first count.

This, however, leaves the legal exceptions to be disposed of, which are—first, that the plaintiff in this count, states only such an injury as is common to all the Queen's subjects who might have occasion to use the alleged navigable stream, or at any rate such as is common to all who may own land on either bank to any extent; and that the proper remedy therefore of the alleged obstruction is by indictment and not by action.

2nd. That the possession of the land being during all the time spoken of in the declaration in the possession of the plaintiff's tenant, the plaintiff has no right of action, as reversioner or otherwise, for an injury of the kind stated.

It was urged by the plaintiff that these objections are not open to the party under the plea of "not guilty," though pleaded by statute, for that such plea only denies the obstruction complained of, and admits besides such special defences as could be set up under the act; in other words, that it does not traverse the plaintiff's possessory interest in the land, nor admit the other objection, that the proper remedy is by indictment; but the cases decided upon that point have fully settled, that when the right to plead the general issue and give the special matter in evidence, is given by statute in such terms as are used in 14 & 15 Vic., ch. 51, sec. 20, every defence must be admitted under it that could be specially pleaded, whether founded entirely on the statute, or partly on the statute and partly not, or a defence wholly independent of the statute. In *Maund v. Monouth Canal Company* (1 Car. & Marsh. 608), that point is stated to have been settled at a meeting of the judges of the three courts, and in *Williams v. Jones*, (11 A. & E. 643); *Eagleton v. Gutteridge* (11 M. & W., 469), and *Taylor on Evidence*, Sec. 295, the law is assumed to be so.

Then as to the first objection, looking at the statements

contained in the declaration, which must govern the reception and the application of the evidence given to support an action under it, we do not think that the plaintiff has stated in it such a case as entitles him to bring a civil action for the obstruction he complains of. He does not in that count rely upon his having been impeded in carrying on any particular trade or business, or on his having been put to any trouble or expense in consequence of the obstruction, and the evidence indeed shews that the mill and land not being at the time in his own occupation, he did not in fact sustain any injury of that kind.

The cases on the question, whether the party suing has sustained a particular damage, so as to entitle him to sue in a civil action for what constitutes a public nuisance, are numerous. In *Wilkes v. The Hungerford Market Company* (2 Bing. N. C. 281,) the point was carefully considered; and from the judgment there given, as well as from the cases cited in it, we conclude that it is not enough to entitle a party to sue in such a case, that his land, in common with all the other land situated upon the river, is rendered less valuable by the obstruction of the navigation, though it must be confessed that it is not easy to determine where a line can be drawn.

We refer to the cases of *Hubert v. Groves* (1 Esp. 148); *Iveson v. Moore* (1 Salk. 15); *Rose v. Miles* (4 M. & Sel. 101); *Chichester v. Lethbridge* (Willes 71).

Upon the other point, the cases of *Jackson v. Pesked* (1 M. & Sel. 234), and *Dobson v. Blackmore* (9 Q. B. 991), are material to be considered. The last mentioned case indeed is applicable to both points; and we are of opinion that we cannot hold, consistently with the judgment given in that case, that the plaintiff as reversioner could recover upon such a case as he has stated in the first count, and as was proved upon the trial. In our opinion, therefore, the rule for entering a verdict for the defendant should be made absolute. The jury seem by their verdict to have been convinced that the plaintiff has hitherto suffered no actual damage, and there was no evidence to shew that he had; we mean as reversioner, for we cannot come to the conclusion,

as the court observed in *Dobson v. Blackmore*, that the obstruction to the navigation will be permanent. Upon both grounds, we think, the plaintiff's action fails,—but more clearly on the first than upon the other; and that the rule therefore must be made absolute for entering a verdict for the defendants.

BURNS, J., concurred.

MCLEAN, J., having been absent during the argument, gave no judgment.

Rule absolute.

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### REGINA V. BELL.

*Custody of infant—Marriage—Imperial act 26 Geo. II., ch. 33.*

Where it appeared doubtful on the affidavits whether a minor, about whose custody there was a dispute, was under or over sixteen years of age, and she had been married by license with her own consent, the court refused to restore her to the custody of the applicant, with whom she had been living as an adopted child for some time previous to her marriage, but who was neither her parent or guardian.

*Semble*, that the English Marriage Act, 26 Geo. II., ch. 33, is not in force in this country.

In March last (1857) an application was made in Chambers to the learned Chief Justice of this court, by the Reverend Charles Henry Drinkwater for a writ of *habeas corpus*, to bring up Georgina Christian, and restore her to the custody of the applicant.

Mr. Drinkwater's affidavit stated, that he came to this country from Kent, in England, in January, 1856, bringing with him the said Georgina Christian: that he was himself married in England, in January, 1851, and that in November of the same year Georgina Christian was brought to live with him as an adopted child, her father and mother being dead, and she being a first cousin of his wife: that she had ever since resided in his family till February last (1857): that she appeared to be no more than eight years of age when she came to live with him in November, 1851, and from information he had received he believed she would become fourteen years of age on the 28th of November, 1857: that she had been always treated well by him, and in every respect as if she were his own child, he having no child living: that since Christmas last he had been living in the



township of Peel, in this province, where Georgina Christian became acquainted with a family of the name of Bell, of an inferior position in life, and on the 7th of November last, in the absence of deponent and his wife, she left her home and went to Bell's, and returned again the next day for a few minutes, and then left again with Rowland Bell, one of the said family : that he had tried to get her back, but without success : that he saw her at the house of Rowland Bell's father on the 11th of November, and on the next day at deponent's own house : that since that time she had been kept and detained from him by the said Rowland Bell, and *as he believed, without her consent* : that Rowland Bell alleged that she had been married to him, and was now his wife : that she was now entitled to considerable personal property accruing to her from the death of a sister : that she was otherwise entitled, as next of kin, to any property that his wife might have, and that considerable property would come to his wife on the 3rd of August next ; and that he verily believed that Rowland Bell, under hope of gain had enticed the said Georgina into the said marriage, and that if she had had a proper opportunity of seeing him, the deponent, on the subject, she would never have contracted such an alleged marriage.

In answer to this it was shewn, that on the 10th of February last Georgina Christian was married by license to Rowland Bell, in the Church of Woodstock, in this province, by a clergyman of the Church of England ; and she swore that she went voluntarily from Mr. Drinkwater's, having promised some time before to marry Bell : that she was married with her own free will : that she desired to be with her husband, who had a farm, and was building a house upon it for them to live in. She swore that she believed herself to be past sixteen years of age.

There was also an affidavit of Rowland Bell, confirming these statements, and swearing that he was himself twenty-two years of age.

The marriage was clearly proved by persons who were present at the ceremony, and a certificate was produced from the clergyman who married them.

The return to the writ set forth these facts.

*Connor*, Q. C., shewed cause, and cited *Forsyth on Infants*, 2; *Stor. Eq. Jur.*, Sec. 1342; *Rex. v. Delaval*, 3 Burr. 436; *Rex. v. Isley*, 5 A. & E. 441; *Rex. v. Greenhill*, 4 A. & E. 641; *Rex. v. Clarkson*, 1 Str. 444; *In re Preston*, 5 D. & L. 247; 4 & 5 Vic., ch. 27, secs. 19, 20; 33 Geo. III., ch. 5; 38 Geo. III., ch., 4; 26 George II., ch., 33 (Imperial); *Burns. Eccl. L. II.* 262 *e.*

*A. Crooks*, contra, cited *Rex. v. Twistleton*, 3 Keb. 432, 1 Lev. 257; *Regina v. Clarke*, 3 Sur. N. S. 335; *Regina v. Manktelow*, 17 Jur. 352, 20 Eng. Rep. 601 S. C.; *McPherson on Infants*, 161; *Whicker v. Hume*, 10 Eng. Rep. 217; *Kent Com.* 1. 473, II. 85; *Burge Col. Law I.* 145; *Regina v. Baxter*, 2 U. C. R. 370.

ROBINSON, C. J., delivered the judgment of the court.

From the tender years of the girl, as represented by Mr. Drinkwater, though not in positive terms as to her exact age; from the fact of marriage being spoken of as resting on her allegation, and that of Rowland Bell; and from the belief sworn to by Mr. Drinkwater, that if they were married it was without her consent, I awarded the writ, but with a strong impression that when the facts were fully brought out, it would be found impossible to restore the young woman to the custody of the gentleman applying for the writ.

I directed the writ to be made returnable in full court, in order that the parties might not be put to the inconvenience of attending twice from a distance; and I was not without hope that in the meantime the parties might either become reconciled to what had taken place, or that the girl might of her own accord have returned to her former protector.

Now upon the return we see all the facts, and it is quite clear that we cannot interfere.

In the case of the female the age of consent is twelve, and there is no doubt whatever that this young woman at the time of the marriage was beyond that age. If in the case of the woman as well as of the man fourteen had been the age of consent, we still could not, on what is before us, act upon the conclusion that Georgina Christian was under fourteen

years of age at the time of the marriage, for that is not a fact positively asserted, or within the knowledge of any one here. It is denied in terms as strong as it is affirmed in on the other side, and the appearance of the young woman seems more to accord with those statements which place her age at sixteen. At any rate there can be no doubt she was above the age of consent at common law, which is twelve years in the case of the woman; and that being so, so far as the statute of 26 Geo. II., 33 (if it be to any extent in force in this province), could affect the question whether the marriage was or was not absolutely void, we have to consider that this was a case of marriage by license, not of marriage after publication of banns, and in that respect differs from the case of *The Queen v. Secker*, in their court, in Michaelmas Term last (14 U. C. R. 604), in which it was necessary for us to consider a question somewhat of this nature.

On this occasion we have only to look at the 11th and 12th clauses of that statute, which enact that marriages solemnised by license, and without publication of banns, between persons either of whom is under twenty-one years of age, without the consent of the parents or guardian of the minor, shall be null and void.

It is not necessary for disposing of this case to determine whether those clauses form part of the law of this province; for taking this young woman to be as old as she appears to be, and as according to her own account she is, which account is not contradicted by evidence of a kind that we could act upon, we could not compel her to live against her will with Mr. Drinkwater, who is neither her parent nor guardian.

All that we could do is, to see that she is at liberty to go with him if she so pleases, but she declares that she will not of her own free will do so. She alleges harsh treatment; whether truly or untruly, her statement in that respect has some confirmation; and though it may be without foundation yet there are expressions in the letters of Mr. Drinkwater, which are filed, that have a tendency to strengthen to some extent what the young woman swears to.

If we were left to determine the single question, whether Rowland Bell is now legally married to her, I will only state

it to be my present impression that we should have to hold that he is. But whether the young woman is now Georgina Christian or Georgina Bell, she is at liberty to depart, for there is nothing in the statute of this Province 4 & 5 Vic. ch. 27, secs. 19 or 20, which was alluded to in the argument, that can affect the course to be taken upon this writ; and besides what we have stated, we take it not to be a usual course for a court to determine the validity of a marriage incidentally and upon affidavit, where it is not shewn that fraud or compulsion has been used.

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# FRASER V. NORTH OXFORD AND WEST ZORRA PLANK ROAD COMPANY.

*Road Company—Unfinished bridge—Right to move against nonsuit.*

A road company are not liable for accidents occasioned by the use of a bridge upon their road while it is in an unfinished state, and the road not completed.

*Semble*, that the plaintiff in this case, having accepted a nonsuit while the judge was charging the jury adversely, was not entitled to move against it.

ACTION for not repairing a certain road in East Oxford, which it was alleged it was defendants' duty to repair, in consequence whereof a horse of the plaintiff's was killed, and his carriage and harness much injured.

*Pleas*—1. Not guilty. 2. That the plaintiff's horse, carriage and harness, were not at the time lawfully in the place in which, &c. 3. That the said place was not a highway. 4. That the defendants were not bound to keep the said place in repair.

At the trial, at Woodstock, before *Burns, J.*, it appeared that the defendants were an incorporated company. In June, 1856, they had contracted with one McLeod to gravel one mile and a half of road, and build a bridge over a small stream, and McLeod had agreed with one Thornton to build the bridge. In October the bridge was yet in an unfinished state: the bents were up, and it was planked, but the planks were not regularly fastened on, and there was no railing to the sides of the bridge, which was about seven feet above the small stream. The bridge was between forty and fifty feet long. The plaintiff's horse and waggon, on a day in



October, were being driven over it by another man. The bridge had been temporarily covered by the contractor, for his own convenience in hauling gravel over the stream. The public generally went through the stream, a road having been made by the side of the bridge to enable them to do so while the bridge was being built, but the person driving this team went over the bridge, as many others were on the habit of doing. The horse that was driven with the plaintiff's horse was a young colt, that had only been in harness once before, and was awkward and shy, and when they got near the end of the bridge he started at a crack between the planks, seeing the water running beneath, and forced the plaintiff's horse over the side of the bridge, by which he was killed.

The bridge was finished during the next month, and given up to the company, but up to that time the company had no other control over it than to see that the work was done according to the contract. There was no proof that the contractor was behind his time. There had been no toll yet imposed on that portion of the road.

The learned judge held that the defendants were not liable under the circumstances, but was willing to allow the case to go on, reserving leave to the defendants to move to enter a nonsuit.

The defendants then called the contractor as a witness ; and after his evidence had been given, the learned judge was expressing his opinion to the jury, that under the circumstances, if any action lay, it would only be against the contractor who was building the bridge, when the plaintiff accepted a nonsuit.

*Horton* moved to set the nonsuit aside.

ROBINSON, C. J., delivered the judgment of the court.

We think the nonsuit was clearly right. The defendants were not bound to keep the road in repair till they had made it. It was not in fact out of repair, in the proper meaning of the term. The bridge was partly built, and was yet unfinished. The defendants could not at that time, for any thing that appeared, have taken it out of the contrac-

tor's hands and completed it. If in the time he took for the work the contractor was to blame, and was liable to consequential damages, which we do not determine, the remedy should have been sought against him.

Besides, the learded judge did not insist on nonsuiting the plaintiff, but had reserved the point, and the plaintiff seems to have interposed, probably from an apprehension that upon the whole facts of the case the verdict would be given against him, and he accepted a nonsuit. Having made that election, I think his right to move against the nonsuit is, to say the least, very questionable.

Rule refused.

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### ROBERTSON V. HAYES.

*Contract to deliver goods, to enable plaintiff to fulfil his contract with a third party—Denial of plaintiff's contract—Refusal to accept part—Pleading.*

The declaration set out that the plaintiff had contracted with one R. to deliver to him 200 firkins of butter, of which defendant had notice; and in consideration that plaintiff would employ him to procure said butter for the plaintiff, to deliver in performance of the plaintiff's contract, defendant promised to use due diligence in endeavouring to procure the same, but that although defendant procured seven firkins for the plaintiff, yet he did not use due diligence in procuring the rest, but made default, whereby the plaintiff was unable to keep his contract with R., and lost great profit which he would otherwise have made.

Defendant pleaded—1. That the plaintiff did not contract with R., nor had defendant notice thereof, as alleged. 2. That he offered to deliver to plaintiff the said seven firkins so procured for him as alleged, but the plaintiff refused to accept the same.

*Held*, on demurrer, both pleas bad.

DECLARATION.—First count—That before the retainer and employment of the defendant by the plaintiff hereinafter mentioned, the plaintiff had contracted with one William Ritchie to sell and deliver to him at Glasgow two hundred firkins of butter, to be delivered in the winter of the year 1857, at the current price of butter in Glasgow aforesaid at the time of delivery, of all which the defendant then had notice; and in consideration that the plaintiff afterwards had, at the request of the defendant, retained and employed him to obtain and procure the said butter for the plaintiffs, so that he, the plaintiff, could ship the same from Brockville to Glasgow, to be delivered there to the said William Ritchie, in performance of the said contract, for reward to the

defendant, he, the defendant, then promised the plaintiff to use due diligence, care and attention, in and about the endeavouring to procure the said butter for the plaintiff, and although the defendant then accepted the said retainer, and in pursuance thereof procured seven of the said firkins of said butter for the plaintiff, yet the defendant, not regarding his said promise, did not use due diligence, care or attention, in and about the endeavouring to procure the residue of the said two hundred firkins of said butter for the plaintiff as aforesaid, but on the contrary thereof the defendant then so carelessly, negligently, and improperly behaved and conducted himself, in and about the premises, that by and through the mere carelessness, negligence, and improper conduct of the defendant in that behalf, he wholly failed and made default in procuring the said residue of the said firkins of butter, and the defendant might and ought to have procured the same for the plaintiff, whereby the plaintiff was unable to keep the said contract with the said William Ritchie, but therein made default, and thereby hath been deprived of great gains and profits which would have accrued to him by completing his said contract &c., and was and is by means of the premises otherwise greatly injured and damnified.

Second count—That before the retainer and employment of the defendant hereafter mentioned, the plaintiff and one William Ritchie had agreed with one another, that for all the butter, not to exceed two hundred firkins, which he, the said plaintiff, should cause to be shipped to the said William Ritchie at Glasgow, in Scotland, he would pay the plaintiff therefore, at the current price of butter in Glasgow aforesaid, at the time the said butter should arrive there, of all which the defendant, before the said retainer and employment, had notice ; and in consideration that the plaintiff afterwards had, at the request of the defendant, retained and employed him to obtain and procure so many of the said firkins of the said butter for the plaintiff, as the defendant could, with due diligence, care and attention, obtain or procure within a reasonable time thereafter, not to exceed in the whole the said two hundred firkins, for reward to the defendant in that behalf,

he, the defendant, then promised the plaintiff to use due diligence, care and attention, in and about the endeavouring to procure the said two hundred firkins for the plaintiff, within such reasonable time as aforesaid; and although the defendant then accepted the said retainer, and in pursuance thereof procured seven of the said firkins of said butter for the plaintiff, and might with due diligence, care and attention, have obtained and procured one hundred and nine more of said firkins of said butter for the plaintiff, within such reasonable time as aforesaid, yet the defendant, not regarding his said promise, did not use due diligence, care or attention, in and about the endeavouring to procure the said one hundred and nine firkins of said butter for the plaintiff, but on the contrary thereof, &c.,—averring default in procuring the said one hundred and nine firkins, and plaintiff's consequent inability to keep his contract with Ritchie, as in the first count.

*Pleas*—1. To the first count, that the plaintiff did not contract with the said William Ritchie, nor had the defendant notice thereof as alleged.

4. To the first count, that defendant offered to deliver to the plaintiff the said seven firkins of butter so procured for the plaintiff as alleged, but that the plaintiff refused to accept the same.

5. To the second count, that it was not agreed between the plaintiff and the said William Ritchie, nor had the defendant notice thereof, as therein alleged.

9. To the second count, that the defendant offered to deliver to the plaintiff the said seven firkins of butter so procured for the plaintiff as alleged, but that the plaintiff refused to accept the same.

The plaintiff demurred to each of these pleas.

*Richards*, for the demurrer, cited *Boorman v. Nash*, 9 B. & C. 145; *Bennion v. Davison*, 3 M. & W. 179; *Dunford v. Trattles*, 12 M. & W. 129; *Cooper v. Blick*, 2 Q. B. 915; 1 Ch. Plg. 252.

*Sherwood*, Q. C., contra, cited *Saund. Pl. and Ev.* 112.

ROBINSON, C. J., delivered the judgment of the court.

It is clear, we think, that the pleas cannot be sustained. If the plaintiff, for any cause, employed the defendant for



hire to buy up two hundred firkins of butter for him, or as much butter as he could procure, not exceeding two hundred firkins, and if the defendant promised to do so and neglected the duty he had undertaken, he must for such fault be liable to an action. It is of no consequence to the defendant whether the plaintiff and Ritchie had made such an agreement together as the plaintiff states in the inducement. The defendant had no business to enquire into that, or put the plaintiff to the proof of it. It is mere inducement to the statement of special damage which is not traversable.

And as to the other plea to each count, we all think that is sufficient, for there may have been good reasons for rejecting the seven firkins alleged to have been tendered; they may have been unfit for sale, and if so no inference would lie from the rejection that the plaintiff did not require the engagement to be fulfilled. If they were rejected without any reason and capriciously, and if that would relieve the defendant from the necessity of attempting to buy any more, which we do not say it would not, then the defendant should have pleaded accordingly, and relied upon such refusal of the plaintiff as proof of his discharge of the defendant from his promise.

Judgment for plaintiff on demurrer,

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### OSBORNE V. JONES.

*Use and occupation—Liability for.*

The land in question was sold to plaintiff in 1855, under a power of sale contained in a mortgage, defendant being then in possession. Plaintiff repudiated his purchase, and a suit in Chancery took place, which resulted in his accepting the deed in 1855. In the mean time, and soon after the sale, defendant applied to the plaintiff for a lease, but plaintiff said he was not in possession and would do nothing; and defendant then leased the place to one M. to hold until the plaintiff should demand possession. No demand was made until the plaintiff received his deed, when M. went out.

*Held*, that defendant was not liable to the plaintiff for use and occupation.

ACTION for use and occupation, and on other common counts.  
Pleas, general issue and payment.

At the trial, at Toronto, before *Hagarty, J.*, the facts appeared as follows:—

The premises for the occupation of which this action was brought, were formerly owned by one Daniel Clark.

On the 20th of April, 1850, he mortgaged them to the Farmers and Mechanics' Building Society, to secure £400, payable by instalments, with interest, giving the usual power of sale if default should be made in payment.

When Clark made this mortgage the defendant Jones was in possession, holding either under him for a term, or in consequence of his being concerned with him as a partner in business. The exact nature of his interest was not shewn on the trial, but only that he had been in possession under Clark.

The mortgage money not being paid, the premises were sold in the latter part of 1853, and were knocked down to the plaintiff as the highest bidder. The deed was prepared for carrying out this sale; it bore date the 1st of December, 1853, and had the seal of the Society affixed to it, in the presence of a subscribing witness, who was examined at the trial, and could not state at what time it was executed.

It had been prepared in the Company's office, and sealed at some time when the plaintiff was not present. It was clearly proved that when the plaintiff was applied to for payment of the sum bid, he repudiated the purchase altogether, and contended that he was not bound by his bid: that a bill in Chancery was filed against him in consequence: that he defended the suit, and maintained that he was entitled on some ground to have a reduction made in the price. This dispute was not terminated till some time in the autumn of 1855, when, as was to be inferred from the evidence, the plaintiff was held bound to accept the title. The Company's solicitor then had some alteration made in the deed, and it was first delivered to the plaintiff in September or October of that year, and two or three days afterwards he sold the premises to one Bradley.

In the meantime Jones, the defendant, who was in possession before and at the time of Clark making the mortgage, made a lease of it to one Murchison, on the 1st of March, 1854, to hold for one year, or till the plaintiff Osborne should demand possession, it being stated to Murchison by the defendant that the plaintiff had bid off the premises at

the auction, and that there was a dispute pending between him and the Company about the sale.

The defendant had in January previous (very soon after the auction) applied to the plaintiff, proposing to take a lease from him for the year, and asking to know his terms, but received for answer that he, the plaintiff, was not in possession, and would do nothing in the matter. And Murchison also, before he took the place from the defendant, had applied to the plaintiff, thinking he could get a lease from him, but the plaintiff declined letting to him, and told him what had passed between him and the defendant.

Murchison quitted the possession on the 1st of October, 1855, upon the plaintiff's receiving his title. Up to that time he had held under defendant Jones, no demand having been made upon him by the plaintiff, either to give up possession or to pay rent, during the whole term of the dispute about the title being pending. In fact during all that time the defendant, or his tenant Murchison, continued in possession, upon an understanding between the defendant and the Company's solicitor that he was to go out of possession whenever he might be called upon to do so. He had at first set up some claim of right to remain in possession, and the Company had agreed to compromise with him by giving him a small sum of money.

Under these circumstances this action was brought by the plaintiff to recover from the defendant Jones compensation for use of the premises, as having been occupied by his, the plaintiff's, permission, from the time of the auction to the 1st of October, when Murchison, the defendant's tenant, quitted it.

The learned judge did not think that the plaintiff could recover, but he allowed the jury to find what the occupation for the period was worth, and to give a verdict to the plaintiff for that sum, which they assessed at £77 10s., reserving leave to the defendant to move for a nonsuit.

The jury found that the deed from the Company to the plaintiff was not really executed before the last of September, 1855.

*M. C. Cameron* obtained a rule *nisi* for a nonsuit on the leave reserved, or for a new trial, on the law and evidence, and for mis-direction. He cited *Kirtland v. Pounsett*, 2 Taunt. 145; *Rumball v. Wright*, 1 C. & P. 589; *Winterbottom v. Ingham*, 7 Q. B. 611; *Turner v. Steam Coal Company*, 5 Ex. 932; *Rawson v. Eicke*, 7 A. & E. 451.

*Eccles*, Q. C., shewed cause, and cited *Archbold's L. & T.* 76; *Tew v. Jones*, 13 M. & W. 12; *Dolby v. Iles*, 11 A. & E. 335; *Panton v. Jones*, 3 Camp. 372; *Sullivan v. Jones*, 3 C. & P. 579; *Balls v. Westwood*, 2 Camp. 13, note.

ROBINSON, C. J.—It is perfectly clear that the plaintiff had no pretence for bringing this action. During the whole period for which he urges his claim to compensation, he neither owned the place nor was in possession of it, but had repudiated, so far as he could, all connexion with it, refusing to assume to act as the owner, because he denied that the Company could hold him to his purchase.

The defendant also, during the whole period, was left to make such arrangements as he chose with the Company, and held the place under them, having offered to take it from the plaintiff, if the plaintiff would have treated with him for it. The plaintiff cannot act so inconsistently as to claim payment now from the defendant, under the pretence that he or his tenant was occupying by the plaintiff's permission, when the fact was so clearly otherwise. The cases cited by the plaintiff's counsel do not apply. The objection here is not that the plaintiff did not hold the legal title between the time of the auction and the making of the deed to him, but that he disclaimed to be the owner of the property in any sense, and left the defendant to deal with other parties. The note written by Jones to the plaintiff in January, 1854, would no doubt have availed the plaintiff as evidence that the defendant had admitted his title, if the plaintiff had allowed the defendant to continue under the impression that he was the proper person to treat with, and had given him permission to occupy, but under the circumstances proved it has no force whatever.

Nothing turns in this case upon the right of the mortgagee,



before giving notice of his mortgage, as against a tenant who entered under the mortgagor before the mortgage was made. That is a class of cases wholly different from the present. The peculiar facts in this case repel the plaintiff's right of action upon grounds independent of any such question.

BURNS, J., concurred.

McLEAN, J., having been absent during the argument, gave no judgment.

Rule absolute.

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MASON V. BRUNSKILL ET AL.

*Sale of vessel—Agreement to pay premium—Admissibility of parol evidence after execution of deed.*

Plaintiff wrote to defendants, proposing to sell them a vessel for a certain sum, the proportion of premium on the insurance then effected, during the time the policy had yet to run, to be paid by the purchaser in cash. The proposition was accepted verbally, and a regular assignment of the vessel executed to defendant, in which no mention of the insurance was made.

*Held*, that the plaintiff might nevertheless recover the premium from defendants.

ASSUMPSIT—Special count, setting forth that the plaintiff, on the 19th of July, 1856, sold a certain schooner to defendants, which before the sale he had insured for £1,500, by a policy extending from the 26th of April, 1856, for one year, for which insurance he had paid £112 16s. 3d. premium: that defendants, in consideration of the said sale and delivery of the schooner, and by their agreement for the purchase thereof, promised to pay to the plaintiff a part of the said premium so paid by him proportionate to the time for which the said policy of insurance was unexpired after the said sale and delivery of the said schooner, but did not pay the same.

At the trial, at Cobourg, before *Hagarty*, J., the assignment by deed of the schooner from the plaintiff to the defendants was produced. It was in regular form, but contained no mention whatever of the insurance, and no intimation of any agreement about return of premium.

The deed was dated 17th July, 1856, and assigned the vessel to the defendants in the following shares: viz., to defendant Brunskill twenty-two sixty-fourth shares, and to each of the others twenty-one sixty-fourth shares.

On the 12th of July, 1856, the plaintiff had made to defendant Brunskill, who was acting for himself and the other defendants in the transaction, a written proposal to sell the vessel for £2,250, payable by instalments from two to twenty-four months inclusive, with interest; and this proposal being verbally acceded to by Brunskill, defendants Wilson and Mitchell accepted bills for the second instalment, which Brunskill endorsed. In the written proposal was this stipulation, "Present policy to remain in Mason's hands as collateral security, and renewal to be in his name, and remain until entire amount is paid up: proportion of premium current payable by purchaser in cash."

This written proposal was addressed to Brunskill. It was not shewn to have been accepted in writing. The plaintiff's agent, who transacted the business on his part, swore that Brunskill accepted the terms; that is, verbally: that he talked with him about the insurance, but could not say that in the conversation which he had with the other defendants about the sale any mention was made of the insurance.

The plaintiff's agent swore that not having the policy by him at the time, he could not make the calculation of the exact sum which the defendants would have to pay, or he would have inserted it; that as it was to have been paid in cash, it was not included in the bills, but that he had several times called on Brunskill for the money, who told him that he must see the other defendants.

At the trial the defendants' counsel contended that the only consideration averred was a past executed consideration, which could not support an assumpsit, the sale having been already made.

2ndly. That the plaintiff was precluded from shewing any other consideration than that stated in the bill of sale, which only mentioned the price of the vessel, saying nothing of insurance.

It was argued also, that when the plaintiff parted with the schooner he lost his interest in the policy, and so there was no consideration for any such payment to him.

The learned judge left it to the jury to say whether in fact the defendants had promised to pay to the plaintiff the

proportion of the premium claimed ; and they found that they had, and gave a verdict to the plaintiff for the amount claimed, £86 10s.

*D. B. Read* moved for a new trial, on the law and evidence, for reception of improper evidence, and for misdirection : for that the agreement for the sale of the vessel was in writing, and evidence of the verbal promise alleged should not have been received ; that no consideration for such a promise was proved or alleged ; and that the written agreement making no mention of a payment of any proportion of the premium, evidence of any such promise was excluded.

*Cur. adv. vult.*

ROBINSON, C. J., delivered the judgment of the court.

We think the evidence fully supported the verdict as regards the justice of the demand, and that there was no legal difficulty in the way of the plaintiff recovering. It cannot be said that the promise was upon a past consideration, and so was *nudum pactum*, for this stipulation, that the vendees were to pay back to the vendor a part of the premium on insurance, proportioned to the period that was yet unexpired after the sale of the vessel, formed a part of the written offer made by the vendor ; and the acceptance of this offer by the defendants constituted the contract. It was all one transaction, and not a condition exacted for the first time after the sale was complete.

The deed of assignment afterwards made was for the purpose of carrying out the main part of the transaction ; namely, the actual formal transfer of the vessel ; but this arrangement about the premium was something collateral, and not at all inconsistent with anything contained in the assignment, which stated only the price given for the schooner.

Rule refused.

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## THE VICTORIA PLANK ROAD COMPANY V. SIMMONS.

*Appeal from sessions—13 & 14 Vic., ch. 54.*

*Quære*, whether a party, having appealed to the Quarter Sessions, under 13 & 14 Vic., ch. 54, from a conviction by a justice of the peace, has any right of appeal from the decision of that court.

If such right exists the conviction must be returned to the court above, on entering the appeal.

The appellant, having been convicted by one Robert Bird, a justice of the peace for the county of Hastings, for passing a toll-gate on defendants' road without paying the lawful toll, appealed to the Quarter Sessions, where the case was tried by a jury, and a verdict rendered for respondents, upholding the conviction. The proceedings were removed into this court by *certiorari*, but the return to the writ set forth only the evidence, and the charge of the chairman of the sessions to the jury.

*Jellett* for the appellant. *Wallbridge*, Q. C., contra.

The court held that the conviction should have been returned, being the ground-work of the proceeding, and that for want of it the cause was not properly before them, and could not be entertained. They also expressed doubts whether there was any right of appeal to this court, under the circumstances, the defendant having appealed to the Quarter Sessions, under 13 & 14 Vic., ch. 54, and given the bond required by that statute, the condition of which is that the appellant shall "appear at the said sessions and try such appeal, and abide the judgment of the court thereupon;" but as the parties had both concurred in bringing the matter up, the appeal was dismissed without costs, and the record was ordered to be remitted to the court of Quarter Sessions.

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During this term the following gentlemen were called to the bar: ROBERT MOORE, HENRY B. BEARD, FRANK BADGLEY, TUNIS LOVE SNOOKS, and W. LYNN SMART.



## TRINITY TERM, 21 VICTORIA.

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*Present :*

THE HON. SIR JOHN BEVERLEY ROBINSON, BART., C. J.

“ ARCHIBALD McLEAN, J.

“ ROBERT EASTON BURNS, J.

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CARSCALLEN V. MOODIE (SHERIFF) AND DAFOE (DEPUTY  
SHERIFF).

*Fixtures.*

A building, originally used as a store-house, was converted into a steam grist-mill. Afterwards the mill machinery was taken out, the boiler and engine being left to work various other machines, which were put in for the purpose of making sashes and blinds, such as planing machines, turning-lathe, &c. These were fastened to the floors and timbers of the building to steady them while in motion, each machine being independent, capable of being moved without material injury to the building or interfering with the engine, and of being worked by any other proper motive power. In the assignment under which the plaintiff claimed these machines were described as chattels, but the deed being void as to the personality for want of registration, he contended that they were part of the inheritance, not subject to an execution against goods, and passed to him with the land and building in which they were, which were included in the assignment; but

*Held*, that the machines were chattels, and seizable under a *fi. fa.* goods.

TRESPASS, for breaking into and entering a steam-mill of the plaintiff's, situate on water lot No. 8, on the west side of Front street, in the town of Belleville, breaking doors, &c., and pulling down walls, floors and partitions, and severing and removing certain fixtures and things affixed to the said building of the plaintiff, namely, one large planing-machine, one small planing-machine, one shingle-machine, one rip-saw and frame, one tenoning-machine, three circular saws, one sticker, one turning-lathe, twelve belts, one circular wood-saw, and one boring machine, of the value of £500, then affixed to part of the said building and tenement; and also, during the time aforesaid, seizing and taking divers goods and chattels, namely, chains, castings, &c., of the value of £500, and disposing of them to defendants' own use.

*Pleas*—1. Not guilty.

2. As to the taking the goods, that they were not the goods of the plaintiff.

3. As to the taking the *fixtures*, goods and chattels, &c., that they were not the fixtures, goods and chattels of the plaintiff.

4. As to the breaking and entering into the building and close, that they were not the building and close of the plaintiff.

5. As to the trespass to the building, pulling down doors, walls, &c., defendant Moodie, as sheriff, and Dafoe as his deputy, justified under a writ of execution, at the suit of Robert Patterson and Reuben S. Patterson, against one Cadwell, from the Court of Common Pleas, for a debt of £117 16s. 3d. and costs, &c., averring that the writ was delivered to the sheriff on the 31st of October, 1855: that Cadwell was before and at that time possessed of divers goods and chattels, liable to be taken under the said writ, which were then in the building; and that the defendants, while the said writ was in force, and in the sheriff's hands, entered into the building in order to levy the damages aforesaid of the goods of the said Cadwell, and did then take the said goods by virtue of the said writ, and the defendant Moodie afterwards returned that he had seized the same to satisfy the said writ, and that they remained in his hands for want of buyers, which is the same breaking and entering, &c.; and averring that in so doing the defendants did unavoidably a little damage to the said building, and the doors, walls, &c.

The plaintiff replied, taking issue on the first four pleas, and to the fifth, admitting the writ and its delivery to the sheriff, &c., but alleging that defendants, of their own wrong, and without the residue of the causes in the plea alleged, committed the trespasses, &c.

See the report of the first trial, ante, page 92.

Upon the last trial of this case, at Belleville, before *Hagarty, J.*, upon evidence varying in some particulars from that upon the first trial, it was left to the jury to say, whether they thought the assignment made to the plaintiff

by Cadwell was real and *bona fide*, and made with intent to pass the property, and to vest it in them to be disposed of for the benefit of the creditors named; or whether it was merely colourable and pretended, for the fraudulent purpose of defeating the execution, and upon a secret understanding between the plaintiff and Cadwell, that the property was still to be under his control, in which latter case the jury were directed that they should find for the defendants.

If the jury should find in favour of the assignment, as being made *bona fide*, and not for any fraudulent purpose, they were then requested to find what was the value of the *alleged fixtures* taken by the defendants; and the parties agreed that it should be left to the court to say whether any or all of the machines which the plaintiff contended were fixtures, and therefore not seizable under the *fi. fa.*, were in fact fixtures; and that the court might direct a verdict to be entered for the defendants, if none of the said articles were fixtures, or might reduce the verdict which the jury should find, by striking out the value of such portions (if any) of the machines, &c., as the court should think were not fixtures, according to the description given of them in the evidence.

The different articles were valued by the witness, who estimated them on the trial, thus :

Large planing-machine .....	£50	0	0
Small do. ....	25	0	0
Lathes .....	7	0	0
Sticker .....	5	0	0
Tenoning-machine .....	5	0	0
Three circular saws .....	8	0	0
Mortising-machine .....	7	10	0
Boring " .....	2	10	0
Shingle-machine .....	50	0	0
Grind-stone, nailed to the floor .....	1	5	0
Four benches for working at .....	5	0	0
Wood-saw, nailed to the floor, to cut wood for the engine .....	10	0	0
Rip-saw .....	5	0	0
Shafts and belting, worth .....	50	0	0
	£231	5	0

The jury found for the plaintiffs £231 5s., thereby adopting the estimate made by the witness of the value of the alleged fixtures, and finding also, that in their opinion the assignment was made *bona fide*, and not fraudulently, in order to defeat the execution; in other words, that Cadwell did mean to assign his goods for the benefit of his creditors generally, and not to leave them to be taken by *fi. fa.*: that there was no secret understanding, and that the property was intended to pass by the assignment. Submitting to the finding of the jury on that point, and assuming as a consequence that the assignment to the plaintiffs must prevail, as it regarded the realty, but must give way to the *fi. fa.* in respect to whatever could be legally seized and was seized by the sheriff under the *fi. fa.* which was against goods and chattels, the parties concurred in leaving it to the court to decide between them as the only matter left in dispute, what portion of the property taken by the sheriff, if any, was personal property liable to be seized under the *fi. fa.* situated as it then was in the building.

The evidence which the jury had before them on that point was to the following effect: Cadwell, the debtor, who made the assignment to these plaintiffs, swore that he had bought the building in question from Hancock, the plaintiff. It was a frame building, on a stone foundation, the walls filled in with brick, three stories high when Cadwell bought it. It had been used first as a warehouse. Hancock put an engine and boilers in, and fitted it up with mill-machinery, and used it for a flour-mill for some time, and then sold it to Cadwell, who added another story to the building, took out the mill-machinery, and leaving the engine and boilers, introduced the other machines spoken of, and carried on in the building the business of a sash and blind factory. He swore that the engine and boilers stood in one corner of the main building, on the lower floor, in which a space was opened to admit the boiler and furnace, brick work being built up from the ground to support the boiler, which was built into it with mason work: that the engine was secured to the sleepers of the building by large iron bolts, and was attached by connecting pipes to the boiler. The machi



for the various purposes spoken of were all connected with the movement of the main shaft of the engine by leather or india-rubber belts, which could not generally be detached by merely slipping them off, but must be cut or unlaced at the junction.

Cadwell swore that there were shafts belonging to different portions of the machinery, which were fastened by bolts and screws to timbers of the main building, without which shafts they could not work the machinery: that in various parts the machinery was fastened by "keys," or let either into the floor timbers or ceiling timbers of the building, and timbers were placed vertically between the floor and ceilings for purposes of the machinery: that if the machines were removed the main timbers of the building would remain, but holes would be left, which had been made in them for the purpose of admitting the machines: that in order to take away the engine itself, the floor would have to be in part taken up, but that would not be necessary for removing any of the machines: that on the lower floor were a turning-lathe, grindstone, shingle-machine and jointer connected with it, a large floor-plane, and a rip-saw which was nailed to the side of the building: that in the floor next above there was a small planing-machine, and three circular saws set in the floor on blocks which were nailed to the floor: that belts came from the main drum below, through the floor: that there was also on that story a sash-sticker, a tenoning-machine and boring-machine, all fastened in the same way, a mortising-machine, which was screwed to the floor and steadied above by braces, and four work-benches nailed to the floor and to the sides of the building: that the large planer was braced above to the beams, and was spiked to the floor above and below, being mortised into planks or timbers spiked to the floor, which plank or timbers belonged to the machine, and also pieces of upright scantling were placed to steady the machines.

That all these machines were put in for the purpose of carrying on a trade.

That when brought in by him they were all ready for use, except being belted, and all could be worked together, or

any one or more of them separately, as they pleased: that the small planing machine rested on the floor, having slips or guides nailed to the floor to keep it steady: that the turning lathe was in no way fastened, but rested on its legs on the floor, and the grindstone was spiked to the floor to steady it: that he could have changed or removed any of these machines, which were only fastened, as he explained, to steady them while being used. Removing the machines he said altogether would weaken the frame of the building more or less.

This was Cadwell's account of the manner in which the machines were fastened.

Another witness, Bogert, swore that he owned himself a steam saw-mill; that he was familiar with such works as Cadwell described, and had often seen his; that he thought his account correct: that the driving or bull-wheel had been put in by Hancock, and was permanently bolted down with iron bolts to timbers or sleepers which supported the floor: that the shafts were fastened with bolts also: that the engine rested on a frame of iron, which was fastened by bolts to timbers, which were bolted to the floor timbers, which floor timbers rested upon stone and mortar: that all the machines were there for trade purposes; that any small machines of the kind could have been put into this building in place of those that were there: each being complete in itself could be easily connected with the moving power, and they could be removed from one mill to another as the owner of them might desire.

To take out the machinery, this witness said, might impair the strength of the building: that drawing the bolts out would injure the timbers, and withdrawing the machinery, where mortise holes had been cut for it, would weaken the frame.

The defendants' witnesses gave this description of the machine in question:

One Bonter swore that this building had been put up for a store-house and could be still used as such, the articles being removed: that he thought the building was not materially injured, though he had not seen it since the machines

were taken away : that with care such machines could be taken out without injury to the building ; the boilers had been taken out by the plaintiff, and sold : that any weakening of the timbers would be occasioned by cutting into them in order to put the machinery in ; this might have weakened some of them.

One Bullen, who had been foreman with Cadwell, and who was yet in his employment when the sheriff came there with the writ, produced a plan of the interior of the building, and explained that the steam-engine was bolted to a block, which was secured as already described : that there were nuts on the bolts : that the boiler rested on blocks of wood on the top of the floor, having mason work under the fire-box, and bricks laid on the floor in front of it ; that they had once removed the boiler without disturbing the brickwork. He said Cadwell's description was correct in some respects, not in all : that the turning-lathe was set loose on the floor ; that the shingle-machine was kept steady merely by its own weight : that the jointer-frame was a separate machine, and was steadied by upright scantling nailed to the beams above : that the large plane was nailed down to the floor with four-inch nails, with some two-inch scantling upright nailed to beams above, and resting on the machine, and nailed to it : that in the second story nothing was fastened to the floor except the mortising machine, which was screwed to it with common iron screws, and stays also came down from the upper floor and rested on the machine.

That a day or two after the sheriff had seized he heard Cadwell say, in presence of the plaintiff, that he would settle the matter : that he expected the sheriff would seize : that he only made the assignment to keep Patterson out of his pay, and that the plaintiffs always said they would settle the matter, or *buy in the machinery, if sold by the sheriff.*

That three or four days after the seizure Cadwell brought *some large nails into the building, and told the witness to nail down all the machinery that could be nailed.*

That the engine and boiler were not removed, though they could have been without injury to the building ; and that all

the other machinery also, he had no doubt, could be removed without injury to the building; that the bull-wheel was let into the beams by cutting pieces of them out, and it could be taken out at pleasure: that all the machines in the building could have been run without brace or nail being used to steady them, but if much power was used they would want support.

One Pringle swore that he had been long used to this kind of business; that all these machines were independent of each other, and could be moved from place to place, or any of them could be placed in a field, and worked there by horse-power: that an ordinary planing-machine need not be nailed down: that he once owned part of this machinery, and it was seized by Cadwell under a writ of *fi. fa.* against the witness; but he did not explain whether it was then set in any building, as it was on the occasion now in question.

This mill of Cadwell's, he stated, was a sash factory, for making sashes and blinds, and that such machines could be worked being merely steadied by slips nailed on the floor; that they worked such planing-machines, stickers and saws; without their being fastened to the buildings.

Billa Flint, Esq., swore that he had been several times in this building: that he had himself a planing-machine which was in this building, and when working it had not to fasten it, except merely by cleats to the floor: that such machines could be taken away, and moved from place to place; that all the machinery in this building was connected by shafts and belts from hangers bolted or pinned to beams above: that he could use such machines in a field, and work them by horse-power: that the shafts were no parts of the machines.

Another witness, Page, swore that he was a machinist; that he had seen this building after the machines had been removed, and did not consider that it had been injured by the removal: that such machinery could be run while resting by its own weight on the floor, and without any fastenings, and could be removed from place to place.

This was the substance of the evidence respecting the various machines, and the manner in which they were put up and used in the building.



*Henderson*, for the plaintiff.

*M. Vankoughnet*, for defendant.

In addition to the cases referred to in the judgments, *Wood v. Hewett* 8 Q. B. 913; *Lune v. Dixon*, 11 Jur. 89; *Thompson v. Pettit et al.* Ib. 748; *Boydell v. McMichael*, 1 Cr. M. & R. 177; *Wiltshire v. Cottrell*, 1 E. & B. 674; *Farrar v. Stackpole*, 6 Greenl. 157; *Corless v. McLagin*, 29 Maine Rep. 115, were cited in the argument.

ROBINSON, C. J.—Before I express an opinion as to the result of the evidence upon the point submitted to us, I will mention that as to the other questions that were litigated in this cause, I remain under the impression which I received at the first trial—that the plaintiff did really and honestly stand in that relation towards Cadwell, that he could justly have called upon him to make him secure by an assignment of his property, or by a mortgage upon it; in other words, that a consideration was not wanting to support that assignment; but as to the other question of fact, namely, whether the assignment that was executed was really made in good faith, and was intended to pass the property to the plaintiff, or was colorable and made upon a secret understanding that it should only be used for protecting the property from execution, and particularly from the expected execution of Messrs. Patterson, and that Cadwell, the debtor, was not to be disturbed in the possession and enjoyment of the property any further than might be necessary for keeping off the execution, I confess my impression, after reading the evidence given upon the last trial, is much stronger against the good faith of the assignment than it was upon the first trial, which took place before myself. However, two juries have found in favour of the assignment, it is not likely, considering the nature of the whole evidence, and the manner in which it was left to the jury, that we should have set aside the verdict upon the merits in this respect, if we had been asked to do so. The case however is a strong one to shew how extremely cautious it behoves a sheriff to be in applying for a proper indemnity,

before he ventures to act in disregard of an assignment made by a debtor, however full of suspicion the circumstances may appear to be; and it is chiefly for the purpose of making this observation, that I have made any allusion to that part of the case.

We have not only to dispose of the question, whether any and what part of the things seized by the sheriff, and removed and sold by him, were liable to be seized under the execution, or whether all or any formed part of the real estate conveyed by the deed.

If they were chattels, we conclude them to have been liable to the execution, on account of the assignment not having been filed with the clerk, and the possession not having been changed.

The question of chattels or no chattels was the only one argued before us by the parties. One would expect to find it a question of very easy solution, upon examination of what has been decided. Considering what an abundant use has been made for a long time in England of machinery for all purposes to which it can be applied, it seems surprising that questions of this kind should not much earlier have arisen, and more frequently, as between heirs and executors, or in cases in which the sheriff coming with a *fi. fa.* against the goods of the owner of a manufactory, has had occasion to determine whether machines placed or used in a building as these were could be treated as chattels, or must be reputed as part of the realty, and so not subject to execution against the goods; but we find few cases upon the subject till we come down to a late period, and very little that is explicit, either in treatises written expressly on the subject of fixtures, or in works in which this branch of the law has been incidentally under discussion.

The law as between landlord and tenant had little application to the question presented in this case.

There is a particular class of cases, in which a condition of things quite similar to that now under our consideration has come under discussion in courts of justices—I mean as regards the description of machine, and the degree in which it has been attached to be freehold, and the character which

it bears while it belongs to and is in the possession of the owner of the fee; but they are of little or no service to us on this occasion, because in the cases I allude to the court determined the matter in issue upon a peculiar ground, which left the question of fixture or no fixture undecided. I allude now to such cases as *The King v. Hogg* (1 T. R. 721), *The King v. The Birmingham Gas Light Company* (6 A. & E. 634), *Regina v. Gust* (7 A. & E. 951), and *Regina v. Haslam* (17 Q. B. 22)0, in which the question was, whether machines for various purposes introduced into a building as these were, which were connected by straps with the moving power, and which could be easily detached, and are in fact often detached and sold separately, were merely chattels while in gear and used in the building, or whither they formed while in that position part of the real estate, and could as such be included in the valuation of real property to be assessed for a poor-rate. The owner contended they were chattels, and so not rateable under the poor laws, which laid the burthen only upon the land. The court, without determining whether they were chattels or not, held that at any rate their value could be properly taken into account under the provisions of the statutes, as the building to be rated must be valued with reference to the purpose for which it was occupied, and the uses to which it was applied. Except what is stated in argument before, there is little in these cases that turns upon the present point in the case before us, though the very question was brought up in them, and was expected to be decided.

Neither in my opinion, does the case of *Winn v. Ingilby* (5 B. & Al. 625) help us to decide the present case, though it is one of a comparatively small class of cases, in which the question of fixtures or no fixtures arose as between the sheriff and the owner of a house, in which he seized under an execution against his goods certain pots, ovens and ranges, which were set I suppose, as they commonly are in dwelling houses.

The defendant in the *fi. fa.* being owner of the house as well as of the fixtures, and not a tenant who had put them in during his term, maintained that they could not be seized as

chattels. The counsel for the sheriff contended that they could, and referred to Pooles' case (1 Salk. 368), where it was held that the sheriff might take in execution vats, coppers, &c., which had been put up by a soap boiler, *in order to carry on his trade*; and whatever a tenant, he said, as between himself and his landlord, could remove, the sheriff might seize; that is, as I assume he meant, upon an execution against the tenant.

But the court held very clearly that the coppers, ovens, &c., were fixtures which would go to the heir, not to the executor, and could not therefore be taken as chattels under an execution against the owner of the fee, whatever might have been the case if the execution had been against a tenant who had put them up during his term.

In that case the ovens, ranges, &c., were necessary to the convenient enjoyment of the dwelling-house, to the walls of which, as I understand the case, they were attached by mason work. They were not articles brought in for the independent purpose of carrying on a trade. Sheppard's Touchstone, 469, 470.

Lord Ellenborough recognises this distinction, in the case of *Elwes v. Maw* (3 East 54), which, from the comprehensive view taken by him of the subject, has become a leading case, and is much deferred to in subsequent cases, though some parts of the doctrine it lays down have been questioned.

There is another class of cases, such as *Richardson v. Ranney* (2 C. P. 460), *Oates v. Cameron* (7 U. C. R. 228), and *Walton v. Jarvis* (13 U. C. R. 616, 14 U. C. R. 640), in which it has been determined that the engine and machinery of a saw-mill, or the engine set in a foundry, and used in carrying on the business, being firmly fixed to the freehold, could not be treated as chattels, although they were attached for the purpose of carrying on a trade, which in *Elwes v. Maw* is spoken of as a matter of a personal nature, not necessary to the enjoyment of the inheritance.

These cases may appear to conflict with the early cases of *Lawton v. Lawton* (3 Atk. 14), *Lord Dudley v. Lord Warde* (Ambler 114), and with some passages of Lord Ellenborough's judgment in *Elwes v. Maw*; but I have no doubt they were



rightly decided upon the principle stated by Lord Mansfield, in *Lawton v. Salmon* (1 H. Bl. 259, note), that the inheritance—that is, the saw-mill in the one case, and the foundry in the other—could not be enjoyed without them, for that they were accessories necessary to the enjoyment and use of the principal.

The cases of *Fisher v. Dixon* (12 Cl. & Fin. 312) and of *Mather v. Fraser* (2 Kay & Johns. 536), support the judgments given in those cases.

If the grist-mill, or saw-mill, or the foundry, which descended to the heir, or was given to a devisee, could be deprived of the machinery, without which it would be no mill or foundry, and would be of no value for the peculiar purpose for which it was erected, nothing would pass to him but a mere shell, generally useless and inconvenient for other purposes; and the value of the real estate would in such cases be destroyed, without a corresponding benefit accruing to the executor; for generally speaking in such cases the machinery taken out of the mill or foundry would not be valuable as a distinct chattel, when separated from the building in which it had been used. Indeed those cases in the books which have determined that a mill-stone, even when taken out from its place in the mill for the purpose of being dressed, and so for the time detached, and also various utensils which were never attached, but which were indispensable to the working of the mill, &c., were to be treated nevertheless as fixtures, could never have been so decided if the machinery itself of which they formed parts, or to which they were necessarily adjuncts, could be all treated as chattels, because it was erected not for domestic or agricultural purposes, but in order to carry on a trade.—*Regina v. Wheeler* (6 Mod. 187).

It must be confessed that the language of the courts, in the multiplicity of cases respecting fixtures, is full of apparent inconsistencies, arising in a great measure from the different aspects in which the question happened to be presented, whether as between heir and executor, vendor and vendee, tenant for life or in tail and the remainder man, or landlord and tenant; and there are in truth many cases of which it is acknowledged that they are incapable of being reconciled.

But, after all, I do not think it admits at this day of any doubt that in such cases as those I have mentioned, the engines, boilers, or machinery affixed to the freehold, and necessary to its character and operations as a grist-mill, saw-mill, foundry, &c., cannot be detached from the building, and taken out of the possession of the owner of the fee, under an execution against his goods.—*Horn v. Baker* (9 East 215), *Coombs v. Beaumont*, (5 B. & Ad. 72).

That seems to have been felt indeed in the present case, for the sheriff did not attempt to remove the engine or boilers, which were framed and built into the tenement, and no question therefore arises in regard to them. What he did seize were no parts of the principal machinery which supplied the motive power, and gave to the building its character of a mill or manufactory, but a number of distinct machines unconnected with each other, which were brought into the building complete in themselves, and which are commonly bought and sold, and frequently transferred from one building to another, without deranging the principal machinery, or occasioning destruction to the building, or interfering with the continued action of such machines as may be left.

If the building had been put up for the accommodation of any one of the various branches of business that were afterwards carried on in it, and the engines and boilers, and the machinery adapted to that business, had all formed parts of one whole, constituting a manufactory of some one kind, it would have been, and is strongly my conviction, that the sheriff, coming with an execution against the goods of the owner of the building, could not have taken away the shingle machine, or carding-machine, or circular saw, or whatever it was, with a view to which the engine and boiler had been put up in the building, and the whole thing made such as it was, because then I think all, even the minutest part of the machinery, would have partaken of the freehold character of that with which it was connected, and of which it formed a part; and I could give no good reason why in such a case it should be lawful to seize a spindle or a shaft as a chattel, merely because it could be detached without

injury to the building, any more than it would be lawful to take away a mill-stone, or a saw, from a building in which it was in use as part of a grist-mill or saw-mill.

But besides the particular character of the several moveable machines in question in this case, there are these considerations. The building was originally a mere work-house, and sold as such: the first purchaser of it put in a steam-engine and boilers, and converted it into a flour-mill, putting in proper mill machinery: Cadwell, the execution debtor, bought it while it was a flour-mill, and used it for a time in that state. I do not think that while he was so using it any person could have come with an execution against his goods, and have seized and removed the mill machinery, or any part of it, as a chattel, any more than he could have taken away the engine and boilers; but it suited Cadwell's convenience to remove the mill machinery, leaving the steam-engine and boilers, attached to the building and the soil, as they had been, and to introduce from time to time distinct machines for different purposes of trade, subjecting them to the motive power by shafts and straps, in the manner described, which connected them with the working of the steam-engine. They were not otherwise attached to the building than in such manner as was necessary for steadying them during the time they were at work, and they could be readily detached and removed without materially interfering with the building or the engine.

The grind-stone, which was one of the articles, was so far attached that it was turned by a strap, which communicated to it the movement of the main shaft of the engine. The same was the case with the turning-lathe. It would seem absurd to hold that they could not be removed as chattels, unless indeed they were necessary parts of some machinery which was undeniably a fixture; but that was not the case. There were others of the machines about which I should, in the absence of authority, have felt more hesitation.

Then we are further to consider that both parties to the assignment, that is, the plaintiff and Cadwell the debtor, treated these machines as chattels, separate and distinct from the real estate, for in the deed of assignment the grantor, after

conveying certain land and other real estate particularly described, with their appurtenances, conveyed and assigned also "all the goods and chattels, stock in trade, plank-road stock, and steam boat stock, set forth in a schedule attached to the deed." And in this schedule the several machines which are now in question are set down as so many chattels, and thus are classed with the personalty in the deed itself.

It has been said that this was done without any direction from Cadwell or the plaintiff, and was merely the idea of the attorney who prepared the deed. So it may have been, but we could hardly deny weight to the fact that these things were expressly conveyed as chattels, upon the ground of any parol declaration of the intention or want of intention with which the language in the deed was used.

Then taking these several circumstances into view, this case very strongly resemeles the case cited by Mr. Van-koughnet in the argument, of *Trappes v. Harter* (2 Cr. & M. 153), and the judgment in that case is altogether in support of the position that the sheriff could legally seize what he did seize in this case, as being chattels that would have gone in case of death to the executor and not to the heir, and that were liable therefore to be seized under an execution against goods.

I have observed of that case that some things laid down in the judgment have been questioned, though not the soundness of the decision itself under the circumstances, and I have been surprised not to find it referred to in some discussions upon the law of fixtures where it certainly would seem material to have cited it.

It is so much in point in the case before us, applying as it does to the same description of machines, introduced in the same manner, and independent and separate in themselves, and fastened in the same way in the building, and the decision not at all turning upon the relation of landlord and tenant, but bearing upon the broad question whether such machine so placed in a building were to be treated as chattels or part of the realty, that we must have found it difficult to decide in opposition to it, if it had stood alone and could not be found to have been over-ruled : but in the



case of *Hellawell v. Eastwood*, decided as lately as in 1853, (6 Ex. 295), twenty years nearly after the case of *Trappes v. Harter*, we find the same Court of Exchequer, when it was differently consituted, deciding fully in accordance with *Trappes v. Harter*, and in a case similar to the present determining that machines placed as these were in a building did not for any purpose form part of the freehold. I see no substantial difference between that case and the one before us.

The machines in that case were for spinning cotton ; they were fixed by means of screws, some into the wooden floor, and others into lead, which had been poured in a melted state into holes in stones for the purpose of receiving the screws. Baron Parke, in delivering the judgment of the court, said, "Before the machines were so attached they were mere chattels, and undoubtedly were distrainable ; and the question is, whether they lost that character by being attached to the floor in the manner described." He then reasons upon the grounds on which their opinions were formed, and expresses the conclusion of the court thus : "We cannot doubt that these machines never became a part of the freehold. They were attached slightly, so as to be capable of removal without the least injury to the fabric of the building or to themselves, and the object and purpose of the connexion was not to improve the inheritance, but merely to render the machine steadier, and more capable of convenient use as châtells. They were never a part of the freehold, any more than a carpet would be, which is attached to the floor by nails for the purpose of keeping it stretched out."

"The machines," he says, "would have passed to the executor," for which he cites Lord Lyndhurst's judgment in *Trappes v. Harter*. "They would not have passed by a conveyance or demise of the mill. They never ceased to have the character of moveable chattels, and were liable to the defendant's distress."

Whatever doubt I might have, upon considering some of the consequences to which a strict application of the language used by the court in these two cases would apparently lead us, they are so much in point upon the question raised in the

case now before us, that I feel it impossible not to accede to them.

I must add that I find nothing in the cases of *Steward v. Lombe* (1 B. & B. 506), or in *Fisher v. Dixon* (12 Cl. & Fin. 312), that conflicts with these two modern cases in the Exchequer, when the difference in the circumstances is considered.

I have looked into the American cases referred to in the argument, and find the same perplexing variety of decisions, in regard to the law of fixtures generally, as in the English courts. In both countries it is admitted many decisions have been made which it is quite impossible to reconcile with judgments in other cases, but the weight of American authority is in favour of treating the machines, standing as they were in the mill, in this case as chattels. After all we must, I think, admit the truth of the remark of Chief Justice Tindal, in *Grymes v. Boweren* (6 Bing. 439) : "It is difficult to draw any very general, and at the same time precise and accurate rule on this subject, for we must be guided in a great degree by the circumstances of each case, the nature of the article, and the mode in which it is fixed." When Mr. Amos published his treatise on the Law of Fixtures, which has been always spoken of with much approbation, neither of the cases in the Exchequer, which it seems to me must govern us, had been determined, and he could not therefore notice them, but was obliged to examine the law without their aid. That part of his work which relates more particularly to the question we are considering extends from page 138 to 151, and it is evident that he was greatly perplexed in his efforts to reconcile the various decisions. "It must be confessed," he says, (page 145), "that these distinctions are very refined, and many cases may occur where their application would be attended with difficulty, and where it might be almost impossible to pronounce what is the precise nature and object of an erection." And again he observes, "It is singular to mark the inconsistency which appears in some of the judicial decisions with reference to the subject." It is certain, however, that

many of the decisions which appear to be inconsistent, are not so in fact, when due allowance is made for the difference of circumstances.

For the reasons which I have given, and on the authority of the two cases to which I have particularly referred, I think we must hold that none of these machines were exempt from seizure under the *fi. fa.* which are enumerated in the statement of the case, and were separately valued in the estimate adopted by the jury, and on account of which they gave their verdict in favour of the plaintiff for £231 5s., and that a verdict should therefore be entered for the defendants. Since I came to this conclusion I have seen the late cases of *Waterfall v. Penistone* (3 Jur. N. S. 15), and *Hutchinson v. Kay* (26 L. J. Ch. p. 457—463), which it is satisfactory to find are quite in accordance with the cases of *Trappes v. Harter*, and *Hellawell v. Eastwood*.

McLEAN, J.—The assignment not being accompanied by an immediate delivery, and followed by an actual and continued change of possession, under the statute, and not being filed in the county court office with the affidavit required by 13 & 14 Vic., ch. 62, is declared by that statute absolutely void as against creditors, so that there was no question made as to the liability of any goods and chattels intended to be assigned with the rest of the property to the plaintiff. The only question is, whether the property consisting of the several machines used for trade purposes in the mill, were in truth fixtures attached to and belonging to the mill, or whether they were goods and chattels, and as such liable to be seized and sold on the execution in favour of the Pattersons.

The building was originally a store-house, not erected for any manufacturing purposes. Subsequently it was converted into a steam grist-mill, a boiler and engine and the necessary machinery being put into it by one Hancock. He sold the premises to Cadwell, who used the grist-mill for some time, but subsequently took out the mill machinery and put in the various implements and machines mentioned in the declaration, each of which was distinct from the other, and capable of being worked by itself, or at the same time

with the whole or any of the others. The several machines were fastened, either to the floors, or beams, or timbers of the building, in such a manner as to steady them when being used—some with nails or spikes, some with screws, and such as could be worked without being thus secured merely rested on the floor, or were prevented from moving on the floor by cleats, or pieces of wood nailed down. All could be removed without material injury to the building, and without any injury to the several articles of machinery, and each machine could be placed any where else, and worked by any motive power capable of driving it. Any other machinery, might be substituted for any one of the several machines which were actually in use in the mill, so that either of them could be removed, or all might be removed, and the steam-power applied to any other subject, without interfering with the use of the building, or its fitness for such purpose.

The steam-engine and boiler, which furnished the motive power for working the several kinds of machinery in the building, have not been seized or interfered with, and being essential for the purpose of driving any machinery, and so connected with the proper use of the building, must be regarded as fixtures not liable to seizure on execution against goods and chattels. If these were removed the building would be rendered useless for manufacturing purposes, and the freehold would thereby be injured ; but the freehold is not injured by the removal of the smaller descriptions of machinery, which can be put in or taken out at pleasure, and which are in themselves complete, and requiring only the application of motive power to set them in operation.

The case of *Trappes v. Harter* (2 Cr. & M. 154), is one very much in favour of the defendants. In that case the property in controversy, which had been taken out of the buildings and sold as chattels by the assignees of the bankrupts, from its description, and the manner in which it was fastened and secured in the buildings, much more decidedly partook of the character of fixtures than the property seized in the present case ; and to remove some portions of it, it was found necessary to take down some of the walls of the building, which had previously been taken down to admit of



the articles being brought in ; but the court held that the assignees were entitled to take the property, and that the plaintiffs who claimed under a mortgage of the freehold must fail in their action. And in the more recent case of *Hellawell v. Eastwood* (6 Ex. 312), it was decided that cotton-spinning machines, which were fixed by means of screws, some into the wooden floors, and some into lead, which had been poured in a melted state into holes in stones for the purpose of receiving or holding the screws, were by law distrainable for the rent of the mills in which they were fixed. In giving judgment, Baron Parke says : “ The only question is, whether the machines when fixed were parcel of the freehold ; and this is a question of fact, depending on the circumstances of each case, and principally on two considerations : first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them—whether it can easily be removed, *integre, salve, et commode*, or not, without injury to itself or the fabric of the building ; secondly, on the object and purpose of the annexation, whether for the permanent and substantial improvement of the dwelling, or merely *for a temporary purpose, or the more complete enjoyment and use as a chattel.*”

Taking these observations as applicable to the present case, and forming a rule for its decision, I have no difficulty in coming to the conclusion, that neither the mode of fastening the machinery, nor the objects for which the several portions were introduced into the building, can be regarded as making that machinery a parcel of the freehold.

The case of *Hutchinson v. Kay* (26 L. J. 457, February, 1857), decides that looms standing upon a loom-foot from which they may be removed at pleasure, will not pass by the general terms of *machinery*, though worked by steam-power which is attached to a mill and mortgaged with it. I do not see that any distinction can be drawn between such machinery and the several machines seized by the defendants, or that the latter can be considered as fixtures belonging to the mill, while the former are decided to be only chattels, and not passing with the mill in which they happened to be situated.

If Cadwell had merely rented the building with the steam-

engine and boiler, and then introduced the several machines which he had in the mill, I think there could be no doubt that while there attached and worked as they were, they would be liable to be seized for rent, or taken in execution, and that he would be entitled to remove them at the expiration of his lease. This could not be if they were put into the building in such a manner as to be inseparable from it without injury to the machinery or building.

It is in this case manifest that the parties to the assignment considered the several machines as chattels, for they are included in the schedule of goods attached to that instrument, and intended to be assigned by it; and the attorney who drew the assignment in his testimony expressly stated that he did not consider it necessary to file a copy in the office of the clerk of the county court, because he supposed that a delivery would immediately be made, and that a continued change of possession would take place. Notwithstanding their being then considered and dealt with as chattels, the plaintiffs seek to recover their value on the ground that they in fact formed part of the realty, and as such were not liable to be seized and sold on execution against chattels.

My opinion, however, is that the view taken in making the assignment was the correct one, and that the plaintiff cannot recover their value in this action. In the case of *Richardson v. Ranney* (2 C. P. 460), the machinery removed was essential to the working of the saw-mill from which it was taken, and the frame or building had been put up expressly for the reception and use of such *articles* as were removed. The articles themselves formed part of the *whole* structure, and could not be removed without rendering it useless. That case, therefore, differs materially from this, for the building, and the engine and boiler attached to it, have not been rendered useless or injured in any way, but still remain constituting the freehold, and may be used for any species of machinery which the owner may think proper to put into it.

BURNS, J.—The case of *Richardson v. Ranney* (2 C. P. 460), relied upon by the plaintiff's counsel, has no applica-

tion to the present case. I tried the case, and it simply was this : The tenant of a saw-mill, in order to render it more serviceable, put in a circular saw, with a bench, and other necessary things to work it, and during his tenancy assigned to the plaintiff, who took possession of the mill and machinery. The defendant Ranney was the landlord ; and a dispute arising between the defendant and plaintiff as to the future ownership of the machinery, the defendant surreptitiously got into possession of the mill, and severed all the machinery claimed by the plaintiff, and removed it to other premises. The plaintiff obtained possession again under a writ of replevin ; and the question to be tried was, whether a tenant, under those circumstances, could maintain replevin, or whether the action should have been trespass to the freehold, treating the landlord as a trespasser for severing such property as should be considered as partaking of that character during the tenant's term. The case of *Dalton v. Whitten* (3 Q. B. 961) shews that trover will lie by the tenant against the landlord for removing articles severed by him as distraining them for rent ; and it appeared to me, if the landlord chose to consider the machinery as severable, for it in truth was severed and carried off by the defendant, it did not lie in his mouth to say at the same time that they were not severable, and that they should be held as part of the freehold, and that he might be liable in an action of trespass, though not in replevin. The act committed by the landlord was done during the existence of the term : and the time had not yet arrived to determine whether the tenant could or could not, as between himself and the landlord, have removed the machinery.

It is true that many *dicta* in the cases are not reconcilable with each other, as to the extent of the right to remove fixtures, and what articles are or are not, according to circumstances, to be considered as fixtures ; but the cases themselves, when closely examined, do not appear to me to present such a conflict as to render it at all doubtful what our judgment should be in this case. There appears a clear distinction throughout the cases between the position of a tenant of premises, who erects machinery, &c., for the purposes of trade, and which as against his landlord he may remove at



the expiration of his term, and the position of one who is the owner of the fee, and who erects machinery, &c., for precisely the same purposes that a tenant may do. In the one case the machinery may be liable to be distrained by the landlord, or may be sold under execution against the tenant; yet in the other case the same kind of machinery, erected in the same manner and for the same kind of use and purpose, is not liable to be treated as goods and chattels upon an execution. The case of the tenant seems to be rested upon the principle that it is for the benefit of trade to consider machinery severable; and as a consequence it must follow that in his case, the fixtures being severable according to the original intention, it being a presumption made in his favour that he did not intend they should become the property of the landlord, they are to be treated as severable for all purposes. No such presumption can be made in the case of the owner of the fee erecting machinery, and therefore such cases must be governed by other principles and considerations. Such machinery as would be considered severable in the case of the tenant, though in the ordinary sense it would be considered as affixed to the freehold, and would, upon an execution against the tenant, be liable to be sold, cannot be sold upon a *fi. fa.* against the owner of the fee. Notwithstanding that such general proposition is clear from the cases, yet we find that the intention of the owner of the fee is held to be an ingredient to determine whether those articles denominated fixtures are to be treated as a part and parcel of the freehold or not; as thus, whether the annexation is for the permanent and substantial improvement of the land, or for the more complete enjoyment and use as chattels. In *Fisher v. Dixon* (12 Cl. & Fin. 312) this distinction is apparent, and the machinery there was held to descend to the heir. I had occasion to make extracts of the opinions of the judges to prove the proposition in the case of *Walton v. Jarvis*. In *Hellawell v. Eastwood* (6 Ex. 295), where the landlord distrained upon machinery of the tenant, Baron Parke, in delivering the judgment of the court, says: "The question is, whether the machines when fixed were parcel of the freehold: and this is a question of fact, depend-



ing upon circumstances of each case, and principally upon two considerations : *first*, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed, *integre, salve et commod*, or not, without injury to itself or the fabric of the building ; *secondly*, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the civil law, *perpetui usus causa*, or in that of the Year Book, *puor un profit del inheritance*, or merely for a temporary purpose, or the more complete enjoyment and use of it *as a chattel*." The case of *Mather v. Fraser* (2 Kay and Johns. 536, 2 Jur. N. S. 900) was a case arising between mortgagees and the assignees of the mortgagor, a bankrupt. The mortgager, being seized in fee, executed a mortgage to secure the payment of a large sum of money borrowed to carry on his business. The mortgagor had, before executing the mortgage, erected a great deal of machinery for the purpose of carrying on the business of copper rolling, having converted an old silk mill into the new business. The question was whether the machinery would pass to the mortgagees, or whether it remained liable to be affected by the bankruptcy of the mortgagor. Sir W. P. Wood, V. C., held that the property in the chattels was so united with the property in the land, that a conveyance of the land itself alone would pass all the chattels connected with it, and he based his opinion upon the intention of the parties as evinced in the language used in the deed of conveyance. The deed recites that it had formerly been a silk-mill and was purchased for copper rolling, and that the mortgagor had lately affixed to or placed upon, in, or about his hereditaments in question, a steam-engine and boiler, together with a large quantity of mill gear and millwright work. The Vice-Chancellor says, looking at the whole contents of the deeds, what the proprietor did, and all things connected with it : " It comes therefore to the case of an owner of land who has erected machinery for the purpose of the actual enjoyment of his land." The more recent case of *Waterfall v. Penistone* (3 Jur. N. S. 15) was one between the mortgagees

and the creditors and official assignees of the mortgagor. It appeared that the freehold estate in the land was mortgaged in 1847 to another person than the defendant, and subsequently a further charge executed upon the land, together with certain machinery then upon the premises. In 1853 the mortgagor executed a mortgage to the defendant, subject to the previous mortgage, and thereby did bargain, sell, assign, and set over to the defendant, the machinery, matters and things described in the schedule to the deed. By the same indenture he transferred the land. Mr. Justice Erle, in giving the judgment of the Court of Queen's Bench, says: "It appears by the case that they were machinery affixed only for purposes of trade, therefore trade fixtures; and the bill of sale to the defendant, under which he makes title treats them as machinery which the bankrupt had a right to sell distinct from the land. In *Hellawell v. Eastwood* the question whether the trade machinery there described, which was annexed to the soil, was liable to be distrained, was answered in the affirmative, on the ground that if the purpose of the annexation was not the permanent improvement of the dwelling, but the more complete use temporarily of the machinery it was a chattel: *and that the intention of the party in the annexation was material to be considered for deciding whether it became parcel of the realty.* According to that decision we hold this machinery to have been a personal chattel within the statute, notwithstanding the annexation to the soil." Again, speaking of the case before Sir W. P. Wood, V. C., Mr. Justice Erle says, "With that decisions we agree: but we think it does not apply to the indenture of the 14th of August, 1854, which first created a primary charge on the machinery now in question, distinct from the land, by way of bill of sale, and afterwards created a separate secondary charge on the equity of redemption by another part of the same instrument."

So far as the conduct of the debtor Cadwell and the plaintiff with regard to the machinery could affect the case, irrespective of the question upon the deed or the manner in which the machinery was used, there could be no reason for doing otherwise than treating the machinery in this case as

chattels. Cadwell professed to deliver the machinery and the plaintiff to accept and receive it as chattels, capable of transfer by delivery distinct from the land. An attempt was made to register the conveyance in the office of the clerk of the county court, as if the property was subject to the acts 12 Vic., ch. 74, and 13 & 14 Vic., ch. 62, which attempt was defeated so far that an execution came into the hands of the defendant before the filing could be effected in the clerk's office. When a question seemed to be made, whether the machinery should be considered liable to the *fi. fa.*, the debtor Cadwell, who had been left in charge by the plaintiff, gave directions to the foreman to nail different parts of it more firmly to the floor and beams, thinking thus to affix the same substantially to the building, and give it the character of being part and parcel of the freehold. The plaintiff feeling that he cannot sustain the transfer to him, because the execution may possibly take priority of his deed if the property be treated as chattels, then falls back upon the conveyance of the land with the mill, and contends that under that deed the machinery, having been previously placed in the mill by the owner of the fee, became attached to the freehold, and would pass to him, and would not be subject to the execution. It appears by the evidence that the building had been erected for and used originally as a flour-mill, but the debtor, Cadwell, when it came into his possession, converted it into a mill for planing boards, making shingles, sash-frames, and a variety of other things. The different kinds of machinery required for this business were separate and distinct from each other, and one portion could be removed without disturbing the rest, and the whole could, as proved by the witnesses, be removed from mill to mill without either injury to the machinery or to the building; and in fact, as was proved, might be set up and used any where in the open air, if there existed the motive power to drive it. The machinery was worked by being placed in what are called benches, and slided in grooves, &c., and the wheels driven by straps or belts. To render these benches firm, and make the machinery work well, and do the work truly, it was, and probably in most cases of machinery of this de-

scription it would be, necessary to do something more than let these benches, &c., stand or rest by their own weight upon the floor. The fastening of such machinery, as is apparent from the evidence in this case, was for no other purpose than for the more complete enjoyment and use of the machines, themselves, *as such*. Then the same being in this state, Cadwell, by deed of conveyance of the 30th of October, 1855, transferred the whole to the plaintiff. The deed recites that for the purpose of rendering it available to his creditors, it had been agreed that he should convey all his estate, real and personal, to the plaintiff. The deed then professes to transfer several parcels of land, and describes them by metes and bounds, with a proper *habendum*. After the transfer of the land, the deed professes further to witness that Cadwell doth assign and set over to the plaintiff, "*all his goods and chattels, stock-in-trade, plank-road stock, steamboat stock, set forth in the second schedule hereto annexed. To have and to hold the said goods and chattels, &c., as the proper goods, chattels and effects of the plaintiff, absolutely, and for ever, for the ends, intents, and purposes mentioned.*" The trust declared is, that the plaintiff do and shall, as soon as conveniently may be, "make sale and absolutely dispose of all and singular the said land, tenements and premises, and all the said goods, chattels, stock and effects granted, bargained, released and assigned, either by public auction or private contract, in one or more lot or lots, and at one time or at several times." The schedule referred to in the deed as number two, containing an account of the goods and chattels transferred, mentions the machinery in question in this action in separate portions; namely, as a large planing machine, a small one, a shingle machine, a tenoning machine, &c. The complete separation of the machinery from the land in this transfer, and the intention of the parties to treat it as chattels; is as complete as it was in the case of *Waterfall v. Penistone*, and therefore differs from the case of *Mather v. Fraser*, where it was apparent the owner of the fee intended the machinery should be taken and considered as part and parcel of the building, and of the land upon which it stood. Throughout the cases it



seems to me quite clear the intention of the parties is made an ingredient upon which the point turns, and is decided. Whether it be safe to adopt that as a rule for *all cases*, it is not necessary to say in the present case. It is sufficient for this case that we can see that the owner of the fee himself never considered or treated the machinery in any other light than as chattels, and as such conveyed them to this plaintiff in trust for payment of debts. If the case had been that the debtor was only tenant of the premises, and would have had a right to remove the machinery in question as trade fixtures, there could have been no question whatever that as against him the sheriff could have sold the fixtures separately and distinctly from the lease of the premises. I do not see that any difference should exist between that and the case which we have before us, namely, the case of the owner of the building putting machinery into it, which he himself appears to have always treated and considered, and which in fact he afterwards sold and transferred as mere goods and chattels. In a case where the owner thought he might consider chattels affixed as part of the freehold, and had treated them as such, there might be reason, when the transaction is *bona fide*, for holding them to be so, in order to effectuate and carry out the intention; but when the owner has never considered the chattels as affixed to the freehold, and in fact has treated them otherwise, I confess I do not see any sufficient reason, as in a case like this, where it is a contest between one class of creditors and another class of creditors of the debtor, why we should hold an opinion different from that of the person who professed to convey them as chattels.

The action is trespass to the freehold, and injury to that, by removing the fixtures, &c. The plaintiff will be entitled to have a verdict entered for him upon the fourth plea, which traverses the plaintiff's title to the building, for his title to that is proved by the conveyance. I do not think the deed should be held void for the whole because it turns out that as respects the personal property, &c., it is ineffectual to transfer it by reason of the execution in the hands of the sheriff taking precedence.

How to dispose of the case upon the fifth plea imposes more difficulty than the others. The declaration charges the defendant with breaking and entering into the plaintiff's building. The plea justifies that entry, for the purpose, as stated in the plea, of taking the goods of the debtor Cadwell which were in the building. The plea has omitted to state that the outer doors were open. The forms of pleas, when the officers justify under process, all state that the outer doors were open, for if the outer doors be not open the officer is not justified in breaking in until he has made a request. This request must be made as well where the plaintiff is the person against whose goods the execution is, as where he is not the person (see Semayne case, 5 Co. 92), the distinction between the class of cases, whether the officer is to be treated as a trespasser, being that if the request be made and not complied with, in the case of the plaintiff being the person against whose goods the execution is, the officer in breaking in is not a trespasser, whether goods be found or not, but in the case of a third person goods of the person against whom the execution is must be found, otherwise the sheriff is a trespasser—that is to say, in such case the officer takes upon himself the risk of being found a trespasser. I refer to *Hutchison v. Birch* (4 Taunt. 619), *Cooke v. Birt* (5 Taunt. 765), and *Johnson v. Leigh* (6 Taunt. 246). We are not asked to determine upon the validity of the defendants' plea, as was the case in *Buckenham v. Francis* (11 Moore 40). In that case the declaration besides containing the usual statement that the house was broken and entered, contained an allegation that the defendants broke and forced open the outer doors, and the defendant pleaded, as in this case, that they entered for the purpose of executing the *fi. fa.*, to which the plaintiff demurred, because the breaking his outer door and entering could not be justified without a previous request to open the door having been shewn: and this plea was held ill. In the case before us the plaintiff replies to the plea, and admits that the defendants were legally armed with process to take Cadwell's goods, but says that the defendants of their own wrong, and

without the residue of the causes stated in the plaintiff's plea, committed the trespass in the introductory part of the plea mentioned, in manner and form as the plaintiff hath in the declaration complained. At the trial no question was made whether the defendants had requested to be allowed to enter, but the deputy sheriff appears to have gone and entered, as any one might have done on business, and the contest between the parties was whether the goods which were found in the building were or not the property of the execution debtor. We have determined that the property was that of the debtor, and therefore, in case the sheriff had found it necessary, after having made a request, to have forced the outer door, he would have been justified. The question then seems to be narrowed down to this: are we to assume or necessarily infer from the declaration, plea and replication, that the sheriff entered into the plaintiff's building without asking to do so: or after we find he obtained the goods of the debtor in the building, are we to assume that still he must be treated as a trespasser for telling us that he broke and entered, without saying that he first asked permission to enter. I should be disposed to hold, even before the Common Law Procedure Act, that at this stage of the proceedings we might determine, as was said by Mr. Justice Chambre, in *Hutchison v. Birch*, "if there had been any extraordinary violence or unnecessary mischief committed by the sheriff in executing his authority, that ought to have been shewn." I think we are now, however, since the Common Law Procedure Act, relieved from considering such technicalities, for it amounts to nothing more, after the case has been disposed of upon the merits. The 291st section is wide enough to permit an amendment of the plea now by inserting the words, "*the outer door thereof being open,*" after the words, "*sheriff and deputy sheriff respectively, at the several times when, &c., entered into the said building and close in which, &c.*" and then the defence will be complete. Such an amendment was made by the court (without consent of parties, or the court being asked to do so) upon the argument of a rule for judgment *non obstante veredicto*, or for a new

trial, in order to further the ends of justice, and judgment was thereupon given, in the case of Parsons v. Alexander (5 E. & B. 263).

It appears to me, therefore, that judgment should be entered on all the issues for the defendants, except the fourth, and that should be entered for the plaintiff.

Judgment for defendants.

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### SWART V. GREGORY.

*Will, construction of—Residuary devise—Whether it includes reversion in lands before devised.*

Testator, after leaving his homestead to his wife for life, devised to his executors "the residue of my real estate of which I shall die seised or possessed," in trust, to sell such portion as should be sufficient to pay his debts, giving them power, in order to effectuate his intention, "to dispose of said real estate in fee simple, or for a term of years, for the purposes aforesaid," and he directed that his executors, after payment of the debts, should hold the said real estate, in trust to convey such portion thereof as might remain to his nephews in fee simple. It did not appear whether testator had any other land besides the homestead or not.

*Held*, that the reversion in the homestead passed to the executors, under the residuary devise.

EJECTMENT, for an undivided eighth part of lots Nos. 104 and 105, on the east side of Christina street, in the town of Sarnia.

On the 14th of September, 1853, Jacob Bartholomew Swart made his will, as follows: "I will and bequeath unto my beloved wife, Mary A. Swart, during her natural life, the homestead, or house and premises, in the village of Port Sarnia, which I now occupy as my family residence, together with all the household furniture and effects therein, and upon said premises, including my team of spotted horses, harness, and buggy.

"*Secondly*, I devise and bequeath the residue of my real estate of which I shall die seised or possessed, unto the executors of this my last will and testament, in trust to sell such portion of the same, at the highest price that can be obtained therefor, as may be sufficient to pay off all my lawful and just debts; and to effectuate this my intention, I hereby vest in my executors full power and authority to



dispose of said real estate in fee simple, or for a term of years, in like manner as I could do myself, if living, for the purposes aforesaid.

“*Thirdly*, I will and direct that my said executors, after paying my aforesaid debts, shall hold the said real estate, in trust to convey such portion thereof as may remain after payment of my debts aforesaid, in fee simple, unto my beloved nephews, Burleigh Wells, Charles Manning, and Eli Giffil.”

He then appointed two persons to be executors of his will.

The testator died without issue. The plaintiff claimed as one of his heirs at law, under our statute 14 & 15 Vic., ch. 6, being a nephew of the testator Swart.

The executors conveyed this land to the three nephews, *cestuis que* trust named in the will, who sold to one John McEvoy, under whom defendant was in possession as tenant.

The question was, whether the reversionary interest in the homestead and premises in Port Sarnia devised to the wife for life, passed to the executors under the devise of the residue of his real estate, or whether that devise extended only to the other lands and real estate of the testator elsewhere situated, and not to the remainder in this land.

At the trial, at Sarnia, before *Richards*, J., a verdict was rendered for the defendant, leave being reserved to the plaintiff to move to enter a verdict for him.

*J. Wilson*, Q. C., obtained a rule *nisi* accordingly, to which *Becher*, Q. C., shewed cause.

The authorities cited are referred to in the judgments.

ROBINSON, C. J.—I think there is no room for doubt in this case. It is a principle in the construction of wills that a residuary devise of all the testator's real estate not otherwise disposed of by the will, will carry the reversion in an estate which he owns in fee, after a particular estate in it which he devises by the same will shall have fallen in.

And it is another principle equally clear, that whatever estate the words of the residuary devise are large enough to embrace shall pass to the residuary devisee.

But these principles are liable to be restrained in their application, when a contrary intention is plainly manifested upon the face of the will (a).

The leaning of the courts has been to give effect to the devise in such cases in favour of the residuary devisee, by holding that it extends to the revisionary interest, and this even in cases where the language of the will would seem strongly to shew a contrary intent in the testator. Some of these decisions have seemed so much at variance with the apparent meaning of the will, that they have been disapproved of by the judges in later times, who have nevertheless felt themselves bound to conform to them. I refer now to the case of *Strode v. Russel* (2 Vern. 521), *Cook v. Gerrard* (1 Lev. 212), *Chester v. Chester* (3 P. Wms. 56), and to what is said of *Strode v. Russel* and *Austin v. Austin*, in *Morgan dem. Surman v. Surman* (1 Taunt. 292), by Sir James Mansfield. *Austin v. Austin*, he remarked, was decided on the authority of *Strode v. Russel*. "It is a shocking decision, but it has been followed by a hundred others."

In these cases there was something on the face of the will tending strongly to shew that the devisor intended the residuary devise not to extend to the particular lands which he had made the subject of a specific devise, although such specific devise did not embrace the whole interest which the testator had in the property. As, for instance where a testator, having devised to certain persons certain specified estates, made a residuary devise to another of all his estates "*not under settlement*," it was held that his residuary interest would pass in lands which were under settlement, but which settlement did not affect the entire estate. And where a testator had devised a limited interest in certain land, and afterwards in the same will made a residuary devise of all his real estates not thereinbefore devised, or not before disposed of, it has been held that his remaining interest in the land out of which he had devised a particular estate would pass, because that was an interest not before disposed of by the will, though the particular house or land

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(a) See *Strong v. Teat*, 2 Burr. 920; *Roe dem. James v. Avis*, 4 T. R. 605; *Goodtitle dem. Daniel v. Miles*, 6 East. 494.

had been made the subject of a devise to a limited extent. The case of Glover v. Spendlove (4 Br. C. C. 337) is another authority to the same effect.

None of that class of cases was so strong as the present in favour of the residuary devisee, which more resembles in its circumstances the case of Wheeler v. Walroone (Alleyne 28), where, upon a special verdict, the case was, that one being seized of the manor of D. and other lands in Somersetshire, by his will in writing devised the manor to A. for six years, and part of the other lands to B. in fee; and then came in this clause, "*and the rest of all my lands in Somersetshire, or elsewhere, I give to my brother, and the heirs of his body;*" and the question was, whether the reversion of the manor passed or not, for it was said that the word "rest" did not extend to such lands only as were not devised before; but it was adjudged for the defendant, that the reversion of the manor passed by the devise. In Rooke v. Rooke (2 Vern. 461) J. S. seized in fee, devised Blackacre to A. for life, and devised to B. "*all his lands not before devised,*" to be sold, and the money to be divided between his younger children. The question was whether the reversion of Blackacre passed by the devise of all his lands not before devised; and it having been referred to the judges of the Common Pleas, they unanimously agreed and certified that the reversion was well devised; and it was decreed accordingly.

In Lydcott v. Willows (3 Mod. 229) a testator seized in fee of houses in Bedfordbury and in Parker's lane, devised his house in Parker's lane to charitable uses; then he gave several specific legacies to several persons named in his will, and then he devised his houses in Bedfordbury to Edward Harris, and Mary, his wife, for their lives; and then followed these words, "The better to enable my wife to pay my legacies, I give and bequeath to her and her heirs all my messuages, lands, tenements and hereditaments, in the kingdom of England, not before disposed of."

The question was, whether this devise would carry the reversion of the houses in Bedfordbury to his wife.

It was adjudged (in the Queen's Bench) that it did not,

but that it ought to go to the heir of the testator, who was plaintiff in the action, it being found that Harris and his wife were dead, and that the wife, who was executrix, had sufficient assets to pay the legacies without the reversion.

But Powel, J., differed. He thought the reversion passed under the word "*hereditaments*."

A writ of error was brought in the Exchequer Chamber, and the court agreeing with Powel, J., the judgment of the Queen's Bench was reversed.

In the case we have to determine, it was not made to appear whether the testator had or had not other real estate than his homestead, which he devised for life to his wife, who is now dead. If he had no other, then there would be nothing to go under the residuary devise to his nephews, who after his wife were the only objects of his bounty, unless we allow the reversion to pass to them. If he had other lands, then I should say that he did in fact mean such other lands to be sold (or so much of them as might be necessary) to pay his debts, and not the remaining interest in the homestead; though I do not say that if he had no other real estate the remainder in the homestead might not be held to come under the devise to his executors for payment of his debts. My opinion is that it might, though it would require to be considered.

Then, without knowing whether he had or had not any other real estate than the homestead, we have to determine the effect of the words, "*Thirdly, I will and direct that my said executors, after paying my aforesaid debts, shall hold the said real estate*" (that is, the residue of his real estate of which he should die seised or possessed), "*in trust to convey such portion thereof as may remain after payment of my debts aforesaid, in fee simple, unto my beloved nephews, B. W., C. M., and E. G.*"

The testator died without issue. He evidently did not mean to die intestate as to any part of his real estate.

It has been argued that the will shews that he could only have meant to devise to his executors such real estate as they could make a present use of for paying his debts, either by sale or *lease*; but they could have sold the reversion, and



it would not have the effect of disturbing his widow in her possession. So, I take it, the executors under the devise could have made a lease for years of the reversion, which would equally have left the widow unmolested.—*Slocomb v. Hawkins* (Cro. Jac. 318 ; S. C. Yelv. 222).

But supposing they could not have disposed of the reversion for paying debts, it would then follow that that portion of the residue of the testator's real estate, which had all been devised to his executors, would be held by them upon the trusts contained in the will; namely, to divide it among the nephews, together with what should remain of the lands which they could sell for payment of the debts. The devisees might say truly, "These other lands, besides the homestead, you still hold after paying debts, because they were not necessary to be all sold, but only a portion of them. The homestead you hold because you could not sell that, and have not sold it. All the residue of the testator's real estate was devised to you. You have paid the debts: and what you still hold, whether because you could not sell it, or because you had no need to sell it, comes to us under the will, and is to be conveyed to us by you." That is in my opinion the effect of the will, though upon the argument the other view struck me more forcibly.

I think therefore the rule must be discharged (a).

McLEAN, J.—To entitle the plaintiff to recover in this case, we must come to the conclusion that the testator, though he devised a life estate to his widow, died intestate as to the reversion or remainder in the premises in question. A strong presumption, however, arises from the fact of his having made a will, and having therein devised the residue of his real estate to certain persons and for certain purposes, that he did not intend to leave any portion of his property undisposed of. It can scarcely be supposed that the testator was not aware, when he limited the estate devised to his wife to the term of her natural life, that after her decease the property would descend to his heirs, if not otherwise disposed of: and when he made the devisee of the *residue* we may assume that he

(a) See Cowper, 43 ; Jarman, on Wills, 2nd Am. Ed. I. 519, 526 ; Cruise Dig. VI. 221.

intended it to apply expressly to the estate which must otherwise descend to his heirs, as well as to any other real property of which he might die seised. If he had other property, the argument would certainly be stronger that the testator, in devising the residue to his executors for the payment of debts, and in trust, as to any part *remaining after* the debts were satisfied, for a specific purpose, intended by *the residue* such lands only as had not previously been devised; but there is no testimony to shew whether the testator had or had not any other land which could have been sold or otherwise disposed of by the executors for the payment of debts, pursuant to the power given in the will. The homestead being devised to the wife for life, and the personal property also, which would otherwise have been applied to the payment of debts, it is manifest that the testator intended that his executors should discharge his debts from the real estate; and as any sale of the homestead, or a part of it, would interfere with the life estate of the wife, a presumption arises that he intended the debts should be satisfied out of some other real estate of which he might die seised. But then the testator gave to his executors *full power and authority to dispose* of the real estate devised to them in *fee simple, or for a term of years*; and from this it may be inferred that he had an expectation that his debts might be satisfied without a sale of the property in fee simple, in which case his executors would hold as trustees to convey to the three nephews named in the will.

We must assume that the debts have been paid, from the fact that the executors have conveyed the lands in pursuance of the power given to them, as they would scarcely have divested themselves of the means of paying them before they were in fact discharged. There is not evidence of the fact, but I suppose we must also assume that the widow is dead, as the party deriving title through the executors is in possession, and the plaintiff could claim no right of possession as long as she continued entitled to a life estate.

There is no doubt that the intention of the testator must constitute his will, and that intention must be gathered from

the words used in the will. When these are sufficiently large, property will pass, unless a contrary intention appears from other parts of the will. In this case it appears to me that the words used are ample to convey all the estate which the testator died seised of to the executors, and there certainly is nothing in the will to shew that he did not intend *all* to pass. He gave a *life estate* to his wife in his homestead, and after having done so he had the *reversion still* to *dispose* of, and he then gave to his executors the residue of his *real estate*. Had he merely given the residue of his *lands*, some doubt might arise, whether it was not intended to confine the devise to other lands to be disposed of for the satisfaction of debts; but when he gave the *residue* of his *real estate*, it would be doing violence to the language to hold that it does not embrace *all* the residue of the estate which he had in any lands of which he might die seised. If the testator had not any other lands but the homestead, then he must have intended, by giving his executors power to *dispose* of the real estate devised to them in *fee simple*, or for a *term of years*, that they should raise sufficient in some way from the homestead to pay his debts; and if any portion of it remained, the same was to be conveyed by the executors to particular persons. If he had other lands which would pass to the executors under the devise, from which the debts could be paid, then the homestead would remain to be conveyed after the death of the widow, or the remainder might be conveyed during her life time.

That a reversion in fee will pass under a general devise of lands or hereditaments—although the testator be seised of real estate in possession to satisfy the words of the devise, and although he may have been ignorant when he made the will of his having such a disposable interest, or it may have been unlikely, from its remoteness, or liability to be defeated by the act of another, ever to come into possession—seems to be established by the cases on that head. and these decisions have also established, that though there may be limitations which may be inapplicable, and there may be

other lands upon which those limitations can operate, a reversion will not thereby be excluded (a).

In the case of *Doe Crump v. Sparkes et al.* (4 D. & R. 247) Abbott, C. J., says: "The general rule of law is, that if the words of a will are sufficient to carry *every* interest which the testator has, they must be understood to convey every interest, unless there be something manifestly shewing that the *intention* is not to pass *all*, but a part;" and he adds, "I cannot find any thing in the language of this will shewing that the testator did not mean to give all he had."

I fully concur in the opinion thus expressed, and adopt it as particularly applicable in this case, inasmuch as I cannot discover any thing in the language of the will under which this controversy has arisen, shewing that the testator did not mean to give to his executors, in trust for particular purposes, all he had.

BURNS, J., concurred.

Rule discharged.

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### McCALLUM V. BOSWELL.

*Ejectment—Tenant in common—Notice of title—C. L. P. A., sec. 242.*

Where in ejectment defendant in his notice claimed the whole premises under a conveyance from A. B., he was not allowed at the trial to set up that he was tenant in common with the plaintiff, and insist upon proof of ouster.

EJECTMENT for lot 20, in the 3rd concession of Hamilton.

At the trial, at Cobourg, before *Hagarty, J.*, it appeared that Elijah Buck was seised of the premises in fee. On the 13th of June, 1842, he made a deed, registered on the 21st of June 1842, assigning this land, with much other real property, and also his personal property, to his sons Almond Buck and Rowe Buck, upon certain trusts declared in the deed, which were for the support of the grantor and his wife, and three of their children, by paying thereout £200 a year during the lives of the grantor and his wife, and after their death to pay £100 to each of their daughters named in

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(a) See Jarman on Wills, I 599; *Chester v. Chester*, 3 P. Wms. 56; *Freeman v. Duke of Chandos*, Cowp. 363; *Atkyns v. Atkyns*. Ib. 808; *Fletcher v. Smith*, 2 T. R. 650; *Doe dem. Cholmondeley v. Weatherby*, East 322. *Doe dem. Moreton v. Fossick*, 1 B. & Ad. 186; *Doe dem. Nethercote v. Bartle*, 5 B. & Al. 492; *Doe dem. Pell v. Jeyes*, 1 B. & Ad. 593.



the deed, and to divide the residue of his property among the four sons of the grantor, including the two grantees in this deed, with proviso that no division should take place until after the death of the grantor and his wife. There were also provisions in the deed to meet contingencies of the death of any of the sons.

The grantor's wife, Sophronia Buck, was still living.

On the 13th of February, 1848, Rowe Buck made a mortgage in fee, registered on the 3rd of March, 1849, of the lands conveyed to him and his brother Almond in trust, including the premises in question, to the plaintiff, Peter McCallum, to secure £81 7s. 9d., payable in three years, by instalments.

This was the plaintiff's title.

The defendant proved that on the 3rd of September, 1855, Almond Buck by deed conveyed the lot now in question to him, and he contended that this made him tenant in common with the plaintiff and so made proof of actual ouster necessary.

The plaintiff in reply called the defendant Boswell, who swore that he claimed title to the whole lot, and was in possession of it by his tenants, admitting no title in the plaintiff or in Rowe Buck, and that the plaintiff had never applied to him for possession, or for payment of the mortgage.

He admitted that he had once applied for an assignment of the mortgage, intending to pay it off. He obtained possession of this land from Almond Buck, who was living on it and claiming it as his own. The present tenants, he stated, were put in by Almond Buck, and Rowe Buck got none of the rent.

The learned judge thought that ouster was not sufficiently proved, and directed a verdict for defendant, though he doubted whether defendant should not have limited his defence according to the Common Law Procedure Act, sec. 242, and he rested leave to the plaintiff to move to enter a verdict for him.

The plaintiff claimed only under his mortgage.

The defendant claimed in his notice the whole estate, by conveyance from Almond Buck.

*J. D. Armour* obtained a rule *nisi* to enter a verdict for the plaintiff, pursuant to leave reserved. He cited *Scott v. McLeod*, 14 U. C. R. 574.

*Galt* shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

The plaintiff claimed under a conveyance of the fee, though subject to a condition, from a person who was seised as joint tenant with another of the legal estate. His making the mortgage seems to have been a breach of trust, but that would not prevent his conveyance from operating at law.

That made the plaintiff tenant in common with the other trustee, and he is tenant in common with the defendant, to whom that trustee has conveyed.

But for want of any notice having been served on the plaintiff by the defendant, that he claimed to be tenant in common with him, the plaintiff was released from the necessity of proving an ouster at the trial, and had nothing to prove but his own right of possession, which he did establish.

In our opinion the plaintiff is entitled to the *postea*.

Rule absolute.

## HENDERSON V. COTTER.

*Warranty—Admissibility of Parol evidence—Estoppel—Failure of consideration.*

*Assumpsit*, on a note, made by defendant jointly with A. and B. Plea, that the note was given for purchase money of a schooner sold by plaintiff to A. and B., defendant being their surety: that the plaintiff on such sale guaranteed the vessel to be sound, but she was not sound, but unsafe and rotten, as plaintiff well knew; and said A. and B. immediately after the sale discovered the unsoundness, returned the vessel to the plaintiff, and repudiated the sale.

At the trial the written instrument of sale was produced, from which it appeared that the sale was to *defendant alone*, and no such guarantee as alleged was contained in it. It was proved that A. and B., after keeping the vessel a fortnight, tendered her back to the plaintiff, but she was refused, and they went on using her.

*Held*, that verbal evidence of the warranty stated in the plea was not admissible.

*Semble*, that the facts did not shew a total failure of consideration, and therefore formed no defence.

*Semble*, also, that the defendant could not shew, in the face of the writing produced, that the sale was to A. and B., not to himself.

This was an action upon a promissory note, made jointly by the defendant with one S. L. Partlow and one William

Partlow, for £37 10s., on the 3rd of July, 1856, payable ten days after date.

The defendant pleaded two pleas. 1st. That before the making of the promissory note, it was agreed between the plaintiff and the two Partlows, that the plaintiff should sell them a certain boat or vessel for the sum of £75, and for securing the payment thereof the two Partlows, as principals, and the defendant as their surety, should give the plaintiff their two promissory notes for £37 10s., and that the plaintiff on such sale should guarantee to the Partlows, and the plaintiff then falsely, fraudulently, and knowingly did guarantee to the said Partlows, that the said boat or vessel was good, sound, and staunch, and free from leakage, and as good, sound and tight, as any stone boat along the shores of Lake Ontario: that the plaintiff did then sell and deliver, and the Partlows then bought, accepted and received, the said boat or vessel, upon the terms aforesaid; and in pursuance and execution of the agreement, the Partlows and the defendants made and delivered to the plaintiff the promissory note declared upon, and another note for £37 0s.; and the defendant alleged that there was no other consideration for the making of the said promissory note declared on than the sale and purchase of the said boat or vessel; and that at the time of the said sale and delivery thereof the said boat or vessel was not sound, staunch or tight, nor free from leakage, nor as sound and tight as any boat along the shores of Lake Ontario, but on the contrary it was then rotten, decayed, leaky, unsound, unsafe, and unfit for use, which the plaintiff then well knew; and the said Partlows, immediately after the sale and delivery of the said boat to them, and the making of the promissory note, discovered that the said boat was not sound, staunch and tight, and free from leakage, but unsound and decayed as aforesaid, and then returned and rendered up the same to the plaintiff, and repudiated, vacated, and rescinded the sale thereof, whereof the Partlows then gave the plaintiff notice. 2nd. That the note declared upon was obtained by fraud.

The replication traversed the promise to guarantee the boat as stated in the plea, and also alleged that the boat was

not rotten, decayed, leaky, unsound, or unsafe, and unfit for use, as alleged; and traversed the return or render of the boat to the plaintiff, and the rescinding of the contract; and denied obtaining the note by fraud, as alleged in the second plea.

At the trial, before *Burns, J.*, at the last assizes held at Milton, the facts proved were these: the boat in question was a very old one, and had been employed in transporting stone from place to place along the shore of the lake. The plaintiff had used her for that purpose, and the Partlows desired to purchase her for the same kind of business. Both of the Partlows were examined on the trial, though objected to. The bargain between them and the plaintiff was that they should purchase the boat at £175, and that defendant should be security for the payment. They stated that before the bargain was completed by the writings, the agreement was that the boat was as sound as any boat engaged in that trade: that the defendant heard the guarantee given by the plaintiff; and that if the plaintiff had not guaranteed the boat to be as sound as the general run of boats engaged in that business, the parties would not have taken her. At the time the Partlows were bargaining for her the plaintiff had part of a load of stone in her, which he took to Toronto. One of the Partlows went to Toronto with the boat, and returned to Port Nelson, and the next day the bargain was completed. The Partlows stated that the plaintiff several times repeated his guarantee that the boat was as sound as any of the stone fleet, meaning boats engaged in the same business, for which the Partlows wanted the one in question. The bargain for the boat was completed on the 3rd of July, 1856, and she was delivered to the parties. The plaintiff transferred the boat to the defendant alone, by an instrument in these words:

Port Nelson, July 3, 1856.

“This is to certify that I have sold the schooner ‘Mary Ann’ to Hugh Cotter, for the consideration of one hundred and seventy-five pounds, lawful money of Canada, to be paid as follows, that is to say, fifty pounds down at sale, and thirty-seven pounds ten shillings currency, to be paid in



three months from date, and thirty-seven poundsten shillings currency to be paid in six months from date, the balance to be paid twelve months from date,—the above schooner to be delivered with all her sails, rigging and tackle on board at this date, peaceably and quietly, and clear of all incumbrances, to be paid with interest, in presence of these

Witnesses.

M. C. Thompson,  
Wm. Douglas.

his

Henry x Henderson  
mark."

The note sued upon was part of the £50 mentioned as paid down. The boat was stated to be capable, so far as size was concerned, of carrying from five to five-and-a-half toise of stone, and could carry that quantity with safety if she had been sound and staunch. After the Partlows got possession, they carried a load of wood from Port Nelson to Toronto and then went upon the south shore of the lake to get stone. The boat leaked so badly they could not carry more than two and a-half toise, and even that quantity was unsafe for a load. After being in their possession about a fortnight they represented her condition to the plaintiff, and wished that he should repair her, or make some deduction in the price. The plaintiff said he would go and see her the next day. He did go, and then the defendant tendered the boat back to the plaintiff, and demanded his notes to be returned, and the money to be repaid. The plaintiff refused to comply, and would not do any thing whatever, and the defendant told him he should refuse to pay the notes. The Partlows, in consequence of the plaintiff refusing to receive the boat back, retained her in their possession, and tried to caulk her, and do something with her, and used her off and on during the remainder of the season of 1856, and finally put her into Burlington Bay, where she had since filled with water, and had become useless and of no value.

On the part of defendant evidence was given, to shew that in fact the boat was very rotten and worthless when the plaintiff sold her, and that she was not worth repairing.

At the close of the defendant's case the plaintiff's counsel contended that the defendant's plea was not proved, and submitted—

1st. That the agreement for sale of the boat was proved by the written paper, and that nothing could be added to that to prove a guarantee, and for want of something in the paper to sustain the plea no parol evidence could be received.

2nd. Supposing the plea could be sustained by parol evidence, then it was not shewn that the contract was rescinded, but the contrary : that the Partlows used the boat for several months, deriving some benefit, and that there was not a total failure of consideration, but a partial failure, and the parties must resort to their cross action.

3rd. That the plea stating that the boat was returned and rendered up to the plaintiff was traversed, and was disproved by the evidence.

So far as the mere statement of the price of the boat, and amount to be paid at different times, might affect the plea, the plaintiff waived that, as it could have been amended.

The learned judge reserved to the plaintiff to move the court to enter a verdict for him for the amount of the note and interest, upon any of the points, if found to be in the plaintiff's favour. •

The plaintiff then produced several witnesses to prove that they were present at the time the bargain was made, though not present all the time, and heard nothing said about the plaintiff guaranteeing the soundness of the boat: but on the contrary, that he had at various times represented to the Partlows that they must buy on their own judgment, and that their eyes must be their merchant. Evidence was given to shew that at different times the Partlows represented that they were satisfied with the boat, and that it was the defendant who disputed the plaintiff's right to enforce payment.

Subject to the legal objections before stated, the learned judge left it to the jury to say whether they were satisfied that the evidence in fact proved the plea, that the Partlows bought on the faith of a guarantee from the plaintiff, or whether they bought upon their own judgment, telling them that if upon the latter, then that the defence failed. The jury were further told that if they were satisfied the Partlows purchased upon a guarantee of the boat to them as stated, then it was further necessary in this action, on the promissory

note, that they should be satisfied there was a total failure of consideration for the whole of the £175. On this point the jury were to consider that the boat did not come back to the possession of the plaintiff. The defendant had tendered her back, but the plaintiff refused to receive her, and the Partlows used her. The attention of the jury was drawn to the position, that in truth upon the evidence, independent of the written paper, the Partlows were the purchasers of the boat, and the defendant was surety, and they were asked to say whether the defendant was or not an assenting party to the act of the Partlows in retaining possession and using the boat, and that if he was not so, then the learned judge thought he would not be bound by their act.

The jury found a verdict for the defendant.

*McMichael* obtained a rule, according to the leave reserved, to enter a verdict for the plaintiff for the amount of the note and interest; and also for a new trial, on the ground that the verdict was contrary to law and evidence, and for misdirection, and for the improper admission of the joint makers of the note as witnesses.

*O'Reilly*, Q. C., shewed cause, and cited *Jeffery v. Walton*, 1 Stark. 267; *Allen v. Pink* 4 M. & W. 140; *Tay. Ev.* 896.

ROBINSON, C. J.—The plaintiff is entitled to have a verdict entered for him for the amount of the note and interest. The case of *Humble v. Hunter* (12 Q. B. 310) makes it somewhat doubtful whether the defendant could be allowed to prove, in the face of the writing which he produced in evidence, that the two Partlows and not he were the purchasers of the schooner; but admitting that he owned it makes the case rather stronger against him in other respects than it might otherwise be, for if that be conceded which he attempted to prove, he was only a surety for them in the matter, having no interest himself. The conduct and declarations of the Partlows after the sale must have a more direct and material bearing upon the transaction than any thing said or done by the defendant. It could be of no consequence whether he was satisfied or not, so long as they were.

But upon the other ground, the defendant's case clearly

fails: namely, that he could not be allowed to give verbal evidence of a warranty, such as he alleged, when the written note for the sale, signed by the plaintiff, is so particular and so clear, and contains no mention of a warranty.

The case cited by Mr. O'Reilly of Jeffery v. Walton, though perhaps a decision as much in his favour as he was able to cite, comes far short of it, for the words "six weeks at two guineas" written in the case in pencil on a card, after the agreement for hiring the house was made, might be reasonably treated as a mere memorandum for fixing the time and rate of payment, on the same principle as in the case of Mason v. Brunskill lately in this court, (a) we considered that the bill of sale of a vessel, which contained, as is usual, mention of the price to be paid, did not exclude evidence of an alleged collateral agreement verbally made, to return to the vendor a portion of a premium paid for the year's insurance, commensurate with the time the policy had yet to run.

But here we have the written note of the sale signed by the plaintiff, and produced in evidence by the defendant, which is full, formal, and particular in its terms, specifying not only the price and terms of payment, but stating also in what condition the schooner was to be delivered; that is, with all her sails, rigging and tackle on board, and to be clear of all incumbrances.

There has been no intimation of a warranty; and to allow verbal evidence to be received that a warranty was nevertheless given, and that of so special a character as the defendant endeavoured to prove, would be altogether inconsistent with discisions made in cases much more like the present than Jeffery v. Walton was, and entitled to much more weight than the ruling of even so great a judge as Lord Ellenborough at *nisi prius*.

I refer to Powell v. Edmunds (12 East 6) and Harnor v. Groves, (15 C.B. 667), in neither of which cases were the facts so unfavourable to the admission of the parol evidence as in that before us.

I think, also that if the warranty could have been taken as

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(a) Ante page 300.



proved, still the plaintiff was entitled to succeed upon the evidence, or rather that the matters proved constitute no defence, to the note upon the merits; but it is unnecessary to go further into the case.

The rule should be absolute, to enter a verdict of the plaintiff for the note and interest.

BURNS, J.—At the trial of this case, I thought in all probability it would turn out that the plea, even though capable of being sustained upon parol evidence as to the facts contained in it, yet would prove no defence against the promissory note; but I thought it best to allow the case to proceed, and reserve the right to the plaintiff to enter a verdict in his favour, if the facts amounted to no defence. Having examined the case and the authorities, it is clear to my mind that the plea affords the defendant no defence against his contract declared on.

The plea sets up a contract of guarantee by the plaintiff to the other two joint makers of the note, that the vessel he was selling to them was sound, &c., and that the defendant was surety for the other makers, and that the vessel was worthless, and was returned and rendered up by the other joint makers to the plaintiff, and they repudiated the contract. The plea admits the delivery of the vessel to the other joint makers of the note, in completion of the contract, and that it was after the making of the note used on that it was discovered the vessel was worthless.

It appears to me these facts disclose in truth but a partial failure of consideration, and therefore the plea is no answer to the court. A plea similar to this may be found in *Sully v. Frean* (10 Ex. 535). It appeared that the defendant still returned the vessel, but in this plea the defendant asserts that the vessel, was afterwards returned and rendered up, when the discovery was made. It appears, however, that the contract was completed, and the discovery made afterwards that the vessel was worthless. The defendant pleads that the other joint makers repudiated, vacated, and rescinded the contract. After a contract has once been completed, to entitle the party to recover back the money, or to resist

payment of the security given for the purchase money, on the ground that the contract has been rescinded, it must be shewn to have been rescinded by mutual consent, and it was not in the power of one party to put an end to the contract by his act or conduct. This appears clear from amounts to a partial failure of consideration, then it cannot *Stephens v. Wilkinson* (2 B. & Ad. 320). If the plea only avails the defendant. *Warwick v. Nairn* (10 Ex. 762) affirming the former decisions on the subject.

A greater difficulty than this, however, is presented by the plea. It appears by the declaration, and also by the plea, that the defendant is a maker of a promissory note in question, but the plea asserts that he is surety for the other makers, and then alleges an agreement with the other makers, the breach of which with them he sets up to avoid his own contract. There is no averment in the plea that the agreement there stated to warrant the vessel was part and parcel of the agreement in the declaration. The allegation is, that the note was given in pursuance and execution of the agreement which preceded it. To set up the breach of one agreement, if it can be done, as the answer to another, it should at least appear to have been made between the same parties. The agreement in the declaration stated is that the two other makers with the defendant promised to pay the plaintiff the amount of the note, and the plea states that the guarantee in respect of the vessel was made with the other makers of the note. See *Webb v. Spicer* (13 Q. B. 894) affirmed in the House of Lords (3 H. L. Ca. 510). Again, this plea does not affirm that the plaintiff agreed to receive the note from the defendant in the character of surety.—See *Manley v. Boycot* (2 E. & B. 46).

Independent of the matter of pleading the plaintiff is entitled to have a verdict entered for him on the evidence given at the trial. Lord Cottenham, in the case of *Hollier v. Eyre* (9 Cl. & Fin. 45), upon an annuity deed, held that upon a question whether a party was a principal or surety, it must be ascertained by the terms of the instrument itself, without aid of extraneous evidence. In *Strong v. Foster* (17 C. B. 201) two of the judges—Jervis, C. J.,

and Mr. Justice Willes—adopt Lord Cottenham's view, and apply it to a joint and several promissory note made like the present one, though the point was not expressly determined, for the Court of Common Pleas, as in the Queen's Bench, thought that it should appear that the plaintiff had accepted the note as surety. It was proved at the trial of the present case, by the written contract produced, that the sale of the vessel was to the defendant alone, and not the other joint makers. By the promissory note declared upon and the paper writing of sale of the vessel, it did not appear that the other two makers of the note had any thing whatever to do with the agreement. The written papers disproved the plea, and shewed that the defendant was a principal, not surety, and the effect of the testimony of the two joint makers of the note was to disprove the written paper of sale. The plaintiff did not sell to all the three parties. His own written document shewed that he sold to the defendant, and the defendant in the face of that document could not shew that the sale was to the other joint makers of the note.

The plaintiff's objection to the reception of the evidence to contradict the written document of sale, was in my opinion well founded. Besides this, it appears from the evidence that the vessel had never been returned to the plaintiff; that it had only been offered, and that the plaintiff had refused to receive her back. The contract, therefore, as a matter of fact, had never been rescinded. The other makers of the note, with whom the defendant alleged the contract of sale was made, kept the vessel in their possession and used her for months afterwards. If the plea of the defendant that he was only surety for the other could be supported, then whether the conduct of the principal could hold the surety liable after the surety was in a position to say the contract was rescinded, need invite no discussion now. The defendant was not in a position to avail himself of any of the rights of a surety, much less of the point suggested, if there be any thing in it.

The verdict should be entered for the plaintiff for the amount of the note and interest—£39 11s. 3d.

McLEAN, J., concurred.

Rule absolute.

## REIST V. THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

14 & 15 Vic., ch. 51, secs. 13, 20—*Farm crossings—Right to plead not guilty, "by statute."*

The Grand Trunk Railway passed through the plaintiff's farm, and where it intersected a lane running from the front to rear of the farm, a cutting was rendered necessary. The plaintiff insisted on having a farm-crossing made in continuation of this lane, *and by means of a raised bridge*. The defendants offered to make it at the place required, but not by a raised bridge; and they were proceeding to cut through the plaintiff's land on either side, to make an approach to the railway, so as to cross upon a level, when the plaintiff interfered, and prevented them from going on with the cutting. They then desisted, and did nothing more. The plaintiff sued them for not making a convenient crossing, and recovered £12 10s.

*Held*, upon the authority of a previous decision, between the same parties, in the Common Pleas, that the action was maintainable, and the verdict must stand, for defendants should have gone on and completed the crossing, at least on their own land.

*Seem*, that in such an action, being for a non-feasance, the defendants could not plead the general issue, by statute, and give special matter in evidence.

CASE, against defendants, for neglecting to make a farm crossing on the plaintiff's land, through which their railway passed.

The declaration, in the first count, set forth that by virtue of the powers contained in the Railway Clauses Consolidation Act, defendants took certain lands of the plaintiff, particularly described in the declaration, for the purposes of their railway. which portion of land so taken by the defendants "severs the remainder of the plaintiff's land into two distinct portions, both adjoining the said piece of land upon which the defendants have built their railway;" and it was alleged that it became the duty of the defendants to make across their said line of railway, *within a reasonable time after taking the said land*, a suitable and convenient farm-crossing, roadway, or bridge, over the said line of railway, for the use of the plaintiff, for the purpose of connecting the portions of the plaintiff's land so severed, &c.: yet that the defendants, not regarding their said duty, have not, though often requested so to do, *within a reasonable time after taking the said land*, made a suitable and convenient farm-crossing, roadway, or bridge, for the use of the plaintiff as aforesaid, so as to connect the portions of land so severed as aforesaid, but have hitherto wholly neglected the same.

In a second count, it was averred that it became the duty



of the defendants to make across their line of railway, *within six months after the taking of the said land*, a suitable and convenient farm-crossing, roadway, or bridge, for the use of the plaintiff, &c. (as in the first count) : yet that defendants, though required to do so by the plaintiff, *within six months after the taking of the said lands*, did not make a suitable and convenient farm-crossing, bridge, or roadway, over the said line of railway, &c. (as in the first count).

In a third count the plaintiff averred, that it was the duty of the defendants to make across the said line of railway, *within six months after they had been thereto required* by the plaintiff, a suitable and convenient farm-crossing, roadway, or bridge, for the use of the plaintiff, &c. (as in the first count); and the plaintiff averred that he did, *six months before the commencement of this suit*, require the defendants to make a suitable farm-crossing, roadway, or bridge, &c.: yet that the defendants, not regarding their duty, did not, *within six months after they were so requested*, make a suitable and convenient farm-crossing, &c.

Defendants pleaded, not guilty, by statute 14 & 15 Vic., ch. 51. sec. 20.

This action was brought on the 19th of August, 1856, and the plaintiff claimed damages from August, 1855.

On the trial, at Berlin, before *Richards, J.*, it was agreed that the evidence taken in a similar case between these parties, pending in the Common Pleas, might be read as evidence in this cause, except what related to damages, subject to any legal exceptions which the defendants could take to the damages being assessed, or this action being maintainable. It was also admitted that the defendants' map was regularly filed before the last action was commenced.

It appeared that along the whole line of railway, across the plaintiff's farm, there was a cutting of from eight to twelve feet deep, except at one point, where there was a considerable embankment (the land at that point being low). The plaintiff insisted on his right to have a crossing over the railway by a raised bridge. The defendant offered to make him a crossing by cutting down his farm road, so as to bring it to the level of the railway; but the plaintiff objected to

that, and would not allow the defendants to go on his land for that purpose.

The defendants could not give the plaintiff a crossing over the railway by a bridge, without going upon his land and constructing an embankment, in order to lead the road up to the level of such bridge, which would make a bridge of sixty feet in length necessary, and a long embankment on each side, which it was averred would cost £350.

The defendants' counsel objected:

1. That if there be a breach of duty by the defendants, the remedy was not by action, but by mandamus, to compel the defendants to make a crossing.

2. That if such an action as this lies, it was necessary to bring it within six months, as this was not within the exception as to continuing damage.

3. That the plaintiff, having refused to allow the defendants to make a convenient crossing, and having insisted on a bridge no action could be sustained.

4. That the defendants were not bound to make a farm-crossing at all.

It was further agreed, on the trial of this action, that the same objections should be open to the defendants which they had moved as grounds of nonsuit in the case still depending before the Court of Common Pleas.

It is necessary, therefore, to state, that in October, 1855, an action was tried between these parties, at Berlin, before *McLean*, J., which had been brought to recover damages from these defendants, for omitting to make a farm-crossing over their railway, which had been constructed on the plaintiff's land.

The defendants, in that action, pleaded, "not guilty."

On the opening of the plaintiff's case, at the trial, it was objected that the action could not be sustained, for that there was no obligation imposed by the 13th section of the Railway Clauses Consolidation Act, to make a crossing such as the plaintiff contended for, but only a crossing from the railway track to the fences on either sides: that the company had no right by law to take possession of the land of individuals, for the purpose of making roads upon them to lead to the railway

track, and could not therefore do what the plaintiff complained of them for omitting to do. And the counsel also contended, that the plaintiff should have made his claim for compensation under the statute, for any inconvenience occasioned to him by constructing the railway upon his land, and that no action would lie for the injury he complained of; namely, the separating one part of his farm from the other.

The learned judge allowed the case to proceed.

The evidence given upon that trial, except such part as related only to the damage sustained, was by consent allowed to be read upon the trial of the present action, which was brought for a continuing damage, arising from the want of a farm-crossing.

It was proved on the first trial that the Grand Trunk Railway passed through the plaintiff's land; that is, it crossed the lot, not longitudinally, but transversely.

In November, 1853, an embankment was made of five chains and twenty links in length, from the east side of the lot. From that point, the land being high, it was necessary to make rather a deep cutting across the rest of the lot, about nineteen chains. While the defendants were doing the work the plaintiff, with a witness, went to their agent, and claimed to have a crossing made in continuation of a lane which he had running through his farm, from front to rear. The agent told him that it could not be conveniently made just at that point, but suggested that it should be made at the commencement of the cutting on the east, where the embankment ended. The plaintiff declined accepting it there, and insisted on its being made at the point where the track intersected his old lane, and that it should be by means of *a raised bridge*.

It was proved, on the defendants' side, that they offered to make the crossing at the intersection of the lane, though not by a raised bridge, and were proceeding to make a crossing by cutting through the plaintiff's land on each side, so as to make a rode which should lead, by a convenient grade, from the plaintiff's land on either side: but they were stopped by the plaintiff, who protested that he would not have a crossing on the level with the track. Such a crossing

might have been made by going into the plaintiff's land about twenty-six feet on the one side, and twelve feet on the other, in order to get a proper slope from the track. The plaintiff interrupted the work, and had stones thrown into the cutting which the defendants made. The defendants' engineer then requested the plaintiff to point out where he desired to have the crossing, and offered to make it for him, if his request were a reasonable one. The plaintiff would agree to nothing but a raised bridge over the railway, which would require approaches to be constructed about 200 feet long on each side of the crossing, and the bridge itself must be about sixty feet long. The expense of such a bridge, with the approaches, would be about £350, whereas a crossing on the lands, by excavating at the intersection of the lane, could be made for £60, and a level crossing running across the defendants' land could be constructed for about £5.

It was proved that the plaintiff had always refused to have any other crossing than by a bridge over the railway.

The learned judge told the jury that if the plaintiff had been left without a farm-crossing, only in consequence of his having insisted upon its being constructed in a particular manner, and if what he insisted upon was unreasonable, as seemed to be the case, then there was no culpable neglect of duty on the defendants' part. The jury, however, gave the plaintiff a verdict for £12 10s. damages.

This verdict was moved against, in the Court of Common Pleas, on the ground that it was against law and evidence; but after argument, the rule was discharged in that court, in Michaelmas term last (*a*), the court being of opinion that it was incumbent on the company to go on and make a farm-crossing at that point which the defendants did not object to, and where they had begun to make it; that is, at the intersection of his farm with the line of railway. The plaintiff's forbidding them, and insisting on a bridge by which to cross over the railway, did not, in their opinion, justify their desisting, and making no crossing.

In this action also the jury found a verdict for the plaintiff,



and £12 10s. damages, leave being reserved to the defendants to move for a nonsuit.

*Galt* obtained a rule *nisi* accordingly, to which *McMichael* shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

In our Railway Clauses Consolidation Act very little is said upon the subject of railway crossings over roads or water-courses to be provided for private proprietors. The English railway acts go much more into detail, and contain provisions by which such disputes as have arisen in this case may be avoided, or at any rate settled without the uncertainty and expense of litigation before a jury.

The statute 14 & 15 Vic., ch. 51, sec. 13, only enacts, that farm-crossings shall be made and maintained for the use of the proprietor of the lands adjoining the railway, and also cattle-guards at all road crossings, &c.

The farmer may or may not have had a private road which the railway intersects. If he had not, the circumstance of the railway separating portions of his farm may make it nevertheless necessary that he should have the means of crossing the railway track; and in that case it would seem reasonable that the point at which it shall cross should be adopted with a view to his convenience; and that generally speaking he should be the judge of what will be most convenient for himself, though he ought not to be countenanced in any thing that would be manifestly unreasonable.

If he had a private road made and in use, which the railway intersects, it may happen that such a change has been made in the surface of the ground at that point, in constructing the railway, that it would be attended with great difficulty and expense to continue his road across the railway upon the very line that it formerly occupied, while by deviating a few feet one way or the other from the old line such difficulty and expense would be avoided. Each case will vary in its circumstances, and whether what the company proposes to do, or what the proprietor insists upon, is the more reasonable, must often be a question; and when such a question does arise, it is very desirable that some

persons or public authority should be empowered to determine between them. In regard to the English and Irish railways, there is provision made for this, but not in our statute.

So also as to the kind of crossing which shall be provided, when there is no dispute about the place of crossing, our statute is silent, unless we should be warranted in holding that what is enacted on that point in the 12th clause of our statute with respect to public highways, may be applied to farm-crossings, though it is not repeated in the 13th clause. I mean, as to whether the crossing shall be above or beneath the railway, or on a level.

The dispute between these parties seems to be as to the kind of crossing, and not as to the place of crossing; for although the company suggested that the best place would be at the point where the cutting ended, yet they did not insist upon that, but were willing to continue the private road across their track, when they found that the plaintiff preferred it; but they differed about the method of crossing.

There was a cutting at that point, about ten or twelve feet deep, rendered necessary, as it seems, by a narrow ridge, which traversed the plaintiff's farm at that point. The company had begun to cut through this ridge on each side of the track, intending that the plaintiff's road might thus come upon the track and cross on the level. The plaintiff objected, and forbade the company to go upon his land, and dig through this ridge, in order to cut his road down. It would have been necessary for them to dig down in his land to the depth of twenty-six feet on one side of the railway, and only twelve on the other. But the plaintiff forbade their doing this, and even threw in stones to fill up the passage they had dug. He insisted upon their carrying his road above their railway by a high bridge, which would have made it necessary, as it is stated, to go in upon the plaintiff's land on each side, to a distance of about 200 feet from the line of railway, in order to form a gradual ascent to the bridge. The bridge itself must have been sixty feet long, and the expense to the company would be about £350, whereas by digging through the ridge, as they proposed.

they could give him a crossing at the level at an expense to them of about £60.

The plaintiff's reason for demanding a bridge was, that he would otherwise be obliged to come through the cutting on each side immediately upon the track, without being able to see along the track on either side till he came upon it. No doubt this would, without proper caution, be attended with danger, though the cutting could probably be so managed as to diminish a great deal of the danger apprehended.

It would be far more convenient, if provision was made for determining by commissioners, or in some other manner, how the crossing should be made, instead of leaving the parties to dispute about it, and to the company at last to take its course ; and leave it to a court and jury to pronounce, at the end of an expensive lawsuit, whether their view of the case was a reasonable one. However, that is the footing, as it seems, upon which our statute leaves this matter to rest.

The plaintiff in this case did indeed attempt to compel the company to come into his view, by applying for a mandamus to compel them to give him a crossing such as he desired ; but we thought we could not take it upon ourselves to direct at what point, or in what manner the railway crossing should be made, as the statute seemed neither to lay down any certain rule, nor to vest a discretion in us ; and the company had not refused to provide a crossing, but only to provide one of a particular kind (*a*).

The plaintiff, consequently, persisting in his demand, seeks his remedy by action. We do not think that the arbitration clauses throw any impediment in the way of an action. If it could be shewn that the parties had agreed to a compensation for the damage done by the railway, in which the inconvenience of a severance, without any means of crossing provided, or to be provided, had been included in estimating the damage, or that the plaintiff had received compensation for that inconvenience through an award, then of course he could not sue for damages for the want of a crossing ; but unless it were shewn that in one way or the other the

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(*a*) See the case reported, 12 U. C. R. 675.

plaintiff had been compensated, he would have a right to bring this action, because, without something to the contrary appeared, it would be assumed that the damages were independent of such a claim, and were given upon the understanding and condition that a crossing would be provided according to the statute.

Then, the parties unfortunately differing in their views of what the company were bound to do, each was left to take his own course. If the company had made a crossing over their whole line upon the proposed plan, and had been prevented from making the approaches to the crossing by the proprietor forbidding and hindering them from coming upon his land, then they could hardly have been held to be wrong-doers, and damages given against them, in an action of tort, for not doing more, provided it should appear to the court and jury, upon the evidence, that what they had proposed to do would have been a reasonable compliance with the act. And it might be contended, with some appearance of reason, I think that if the proprietor prevented their doing that which would have been sufficient under the circumstances, he could have no claim to substantial damages, because the company had not made over their own line a portion of a road which he could neither get on or off, and which could be of no use to him so long as he persisted in having nothing but a bridge, and would not make himself, nor suffer to be made by the company, the necessary approaches to the railway on either side.

If, however, the court should hold, upon the evidence, that the company were bound to provide a crossing over their track by a bridge, then no doubt he would be entitled to substantial damages, for it is proved that they have refused to do that.

I am disposed to think that in this case the crossing which the company proposed to give would have been a reasonable compliance with the act; and if the jury had found only nominal damages, I should have thought they had not improperly disposed of this case. They have given only a small amount.

If the defendants were confident, that by making a level



crossing they would be sufficiently complying with the act, they would find themselves no doubt in a better position by making a crossing on that principle, at least over their own line; and then if they had begun to make, or offered to make, the necessary approaches to it on either side, by cutting through the ridge, and had been forbidden by the plaintiff to enter upon his land for the purpose, the company, I think, would have been as safe from an action as if they had done what the plaintiff prevented their doing.

In the action between these parties, depending in the court of Common Pleas, and presenting the very same question though applied to a different period of time, it has been considered that the defence failed, because the company had done nothing: that is, had provided no crossing, even on their own line, where they could have made it. They have consequently discharged the rule, and we discharge the rule in this case also, on the authority of that decision.

The defendants, it must be remarked, have pleaded only the general issue, which would not let them into the defence set up by them, unless being pleaded as it is by statute 14 & 15 Vic., ch. 51, sec. 20, they could give the special matter in evidence under it. The action is not any thing done by the company under the statute, but for a breach of duty, in omitting to carry out a direction given by the statute; and though the language of the 20th clause referred to is different from that generally used in clauses of this kind, yet I rather think it does not apply to an action brought, as this is, for a non-feasance.

The case of *Richards v. The South Wales Railway Company*, (13 Jur. 1095) is more applicable than any other to the particular circumstances of this case. In the American railway acts the provisions respecting farm-crossings are more like ours, and there are cases reported in 10 Barbour's Reports, N.Y. 87, and 12 Barbour 227, which contain interesting decisions upon some points presented in the case before us. We allow the verdict given in this case for £12 10s. to stand.

Rule discharged.

## THROOP V. FOWLER.

*Trespass—Damages after the issuing of the writ.*

In trespass to land, where the action was brought on the 7th of May.

*Held*, that the plaintiff might recover to the extent of the ultimate injury resulting to the crop from the act complained of, as ascertained at the time of harvest.

TRESPASS, upon the east half of lot 21, in broken concession A., of the township of Hamilton, trampling upon and destroying the grass and grain of the plaintiff growing thereon, breaking down fences, carrying away rails, digging holes and putting on the plaintiff's land, and encumbering the same with gravel.

Pleas—Not guilty, by statute. 2nd. License. 3rd. The close not the plaintiff's.

Verdict for plaintiff £20.

*Galt* moved for new trial, without costs, on the ground of a miscalculation in regard to damages.

At the trial at Cobourg,<sup>2</sup> before *Hagarty*, J., the defendant's counsel and attorney were absent when the cause was tried, and so lost the opportunity of insisting that in the estimate of damages the jury could not allow for any injury which had not yet been sustained at the time the action was brought though such injury might be sure to follow, and was shewn to have followed, from what was wrongfully done by the defendant before the writ was sued out.

The complaint was, that the defendant, who was a contractor on the railway, and his men, without necessity or excuse drove over the plaintiff's fields, where crops were growing, and thereby injured the grass, grain, &c.

The action was commenced on the 7th of May, and the witnesses, giving their evidence after the harvest, described to what extent they considered the crops had suffered.

*Cur. Adv. Vult.*

ROBINSON, C. J., delivered the judgment of the court.

Strictly speaking the plaintiff ought not to have recovered damages except for such injury as the crop had received to 7th of May; still we think we should scarcely set aside this verdict; the defendant ought to have taken care to

attend to his defence ; the damages do not exceed £20 ; and the courts in such cases generally decline to relieve against the verdict, unless where it would be proper to do so without making the defendants pay costs ; and besides, it is at any rate just that the plaintiff should recover damages for the loss of his crop, if he has a right to recover at all ; and if he could recover in another action for the damage sustained after the 7th of May, it would be better for both parties to allow him to retain his present verdict. There is no danger of the plaintiff being allowed to recover a double indemnity for his loss, for the court have it always in their power to prevent that.

But we apprehend there was nothing wrong in the plaintiff having been allowed to recover the full amount of damage which the crops sustained by reason of the trespass committed before the 7th of May, although a proper estimate could not be made of it until after the harvest, when the effect upon the crops could be fully seen.

This question is treated of, though not extensively, in Mr. Sedgwick's Treatise on Damages, page 104 to 109, and a reference to the cases of *Prince v. Moulton* (1 Ld. Raym. 249), *Fetter v. Beal* (Ib. 330, 691), *Howell v. Young* 5 B. & C. 259) and *Battley v. Faulkner* (3 B. & Al. 288), will confirm what appears to be the reason of the thing, namely, that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict ; for if the nature of the wrong was such as to produce the effect, the jury may give damages accordingly, though the effect had not occurred when the action was brought. That was the doctrine of the court in *Fetter v. Real*.

The distinction is, where there is a continuance of the wrong, as in cases of overflowing land ; or where all results from the one act, as in cases of an aggravated battery, where by a violent blow a permanent disability has been occasioned : and this is sometimes stated to be the test namely, whether a new action could be brought for the later damage.

Now we take it that in the present case a new action

could not be brought, merely on account of the injurious consequences which discovered themselves after the 7th of May, when this action was brought.

Rule refused.

# COOMBS V. THE MUNICIPAL COUNCIL OF THE COUNTY OF MIDDLESEX.

*Court House—Control and repair of—7 Wm. IV., ch. 18, 12 Vic., ch. 81, secs. 36, 41.*

The magistrates in the Quarter Sessions have no power to order furniture for the court house, and the County Council are not liable for furniture so supplied.

The fact that the court house was also used as a shire hall for the sittings of the Council, and the furniture made use of by them, could make no difference.

## SPECIAL CASE.

Upon the order of the magistrates of the County of Middlesex in Quarter Sessions, the sheriff of the county ordered of the plaintiff, who is a cabinet-maker and upholsterer, and the plaintiff furnished and put up, the following articles, on the 9th of February, 1857 :

### *In the Court Room.*

Five sets damask curtains .....	£71	0	0
Five sets blinds and rollers. ....	5	0	0

### *Judge's Room.*

One carpet. ....	5	0	0
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### *Sheriff's Office.*

One carpet, (40s.) chair cushion, (15s.)	2	15	0
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### *Clerk of the Peace Office.*

Three office chairs and cushions .....	5	5	0
Repairing chairs .....	*1	0	0
Two carpets .....	3	0	0
Refixing iron work to office chair, and lifting door .....	*0	6	3

Total .....	£93	6	3
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At the adjourned session on the 18th of April, 1857, this account was duly audited (first having been sworn to,) and a draft was signed by the chairman, in favour of the plaintiff, upon the treasurer of the county for the amount.

The matter being brought to the attention of the defend-



ants, and they considering that the magistrates had exceeded their authority, the treasurer was directed by them not to pay the draft—except as regards two items, amounting to one pound six shillings and three pence, marked thus \*, which were for things ordered by the County Council Clerk, which the plaintiff refused to receive, unless the whole bill was paid—which direction he obeyed.

The account was audited and draft issued under the statute 7 Wm. IV., ch. 18, in accordance with all the provisions of that statute, under the presumption that that statute gave them authority to order these things. The prices are not disputed, but the liability of the defendants or the treasurer to pay the amount, or any part of it, except as above is disputed.

The curtains and blinds in the court room still remain there, and the meetings of the defendants, as also of the different courts of justice, have been held in that room since they were put up by the plaintiff, as usual. The carpet also remains in the judges' room, and the articles furnished for the office of the sheriff and clerk of the peace are still used by those officers.

If the County Council or treasurer are liable to pay the amount, or any part of it, except as to the sum of one pound six shillings and three pence above named, in the opinion of the court they will do so, with interest from the date of the draft. The payment of costs to be at the discretion of the court.

*Becher*, Q. C., for plaintiff.

*Connor*, Q. C., for defendants.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the plaintiff has no claim upon the municipality to pay him for expenses incurred upon the express order of the justices of the peace.

He has obtained the order of the Court of Quarter Sessions in his favour, signed by the chairman, and professing to be made by virtue of the statute 7 Wm. IV., ch. 18, and 9 Vic., ch. 58.

The latter statute clearly has no reference to the charges of this description, but only to fees for services rendered in criminal proceedings. Under the former act the order would be void, unless it quotes the act of parliament under which it was made. The question, therefore, is whether the

statute does in itself authorise this order, for it is the only other act named. It is certain that that act makes no provision relating to this kind of expenditure, or to any particular kind, but only to the payment of such as are authorised by other acts.

The statute 4 & 5 Vic., ch. 10, sec. 39, makes it the duty of the municipality to keep the public buildings in repair, and provide means, and defray such expenses connected with the administration of justice as used to be provided for by the justices of the peace out of the district funds.

Of course when the justices of the peace lost the power of raising funds to meet these charges, the duty could be no longer incumbent upon them to attend to those objects. And the statute 12 Vic., ch. 81, secs., 36 and 41, gave to the County Council the discretion of doing what was necessary for repairing and keeping in order the court house, shire hall and other public buildings.

The justices cannot, since that, bring any charge upon the county by any thing which they may take upon them to do in these matters, which are thus placed especially under the care and control of the Council.

The claim indeed seems rather to be attempted to be supported on the other ground, that the curtains and window-blinds which came to more than three-fourths of the amount of the order, were put up in the court room, which is also used by the Council as the shire hall. But we do not see that that fact at all helps the plaintiff's case. The court house is not exclusively the shire hall, and there is no pretence for saying that these things, or any of the other items in question, were furnished with a view to the accommodation of the County Council. If that had been the object, it would surely have been left to the Council themselves to give the order, and to direct and approve of what was done.

They could not be expected to abandon the court house because it was made more comfortable or respectable than it had been before, and therefore their continuing to use it after the change as before, raises no implied assumpsit on their part to pay for what was not ordered by them, nor by their agent, but by the justices with a view to the accommoda-

tion of the courts, and not from an idea on their part that it rested with them to provide furniture for the use of the Council.

Besides, we could not rely upon the supposed acceptance and use of the articles by the Council as furnishing proof by implication that the things were provided at their request, for it is expressly admitted that it was the sheriff of the county who gave the order to the plaintiff, and he certainly was not the agent of the Council.

It is a pity that there should be any reluctance on the part of the Council to do anything reasonable and proper for the furnishing of the court room, which is in itself a very satisfactory one, and highly creditable to the county, but we know no ground upon which we could hold the Council to be liable to pay any of the charges referred to us.

Judgment for defendants.

### DEFORREST ET AL. V BUNNELL.

*Chattel mortgage—Objections to affidavit for filing—Irregularity in jurat—Initials.*

Where a witness to a chattel mortgage, given by two persons, swears that he saw both mortgagors execute when in fact he only saw one, and the mortgage has been registered on such affidavit, it is sufficient.

It is no objection that the second christian name of the deponent is not written in full, but the initial only given.

The jurat was as follows: "Sworn before me at the Brantford of——— in the———county of Brantford, this 13th day of October, A.D., 1855: George W. Maloch, a commissioner for taking affidavits in the Queen's Bench, in and for the said county of Brant."—*Held* sufficient.

An affidavit of execution, sworn before the mayor of a foreign town, is useless. Affidavits of this nature will not be treated with the same particularity as affidavits used in proceedings before the court.

TROVER, for a scow called "J. Warren."

*Pleas*—1. Not guilty. 1. That the goods were not the plaintiff's property.

At the trial, before *Burns, J.*, at the last assizes held at Brantford the facts appeared to be these: two persons, of the names of Eli B. Knox and Oscar Cheney, were owners of the scow in question; and on the 24th of December, 1855, they executed a bill of sale, absolute in terms, and thereby transferred the scow to the plaintiffs. On the same day both plaintiffs made an affidavit of the transfer being *bona fide*, according to the statute; and on the 27th of December

an affidavit of the due execution of the instrument was made by the subscribing witness, and the instrument was filed in the office of the clerk of the county court on the same day. The defendant claimed to hold the scow under a bill of sale by way of mortgage, executed by the said Knox and Cheney, describing themselves as Knox, of Buffalo, in the State of New York, and Cheney of Brantford, carrying on business under the firm of Knox & Cheney, in the said town of Brantford, to one E. M. Miller (other property also being included in the bill of sale), purporting to be made on the 12th of October, 1855, to secure Miller in the sum of \$3,200, to be paid, with legal interest, in one year from the date. This instrument was executed by Knox in Buffalo, in the State of New York, and an affidavit of the execution was sworn by the subscribing witness on the 12th of October, 1855, before the mayor of Buffalo. The other mortgagor, Cheney, executed the instrument at Brantford, on the 13th of October; and the witness to his signature made an affidavit of the execution, sworn before a commissioner for taking affidavits for the Queen's Bench in the county of Brant, stating that he saw the instrument executed by both of the mortgagors, though in fact that allegation was an error, for he in truth only saw Cheney execute. The mortgagee, Miller, made an affidavit, on the 13th of October, in order to comply with the statute, to file the instrument; but the jurat to that affidavit was in these words: "*Sworn before me, at the Brantford of——, in the——county of Brantford, this thirteenth day of October, A.D. 1855: George W. Malloch, a commissioner for taking affidavits in the Queen's Bench, in and for the said county of Brant.*" This instrument was filed on the 15th of October, 1855, in the office of the clerk of the county court. It was admitted that the debt due the plaintiffs was a *bona fide* demand due to them from Knox and Cheney; and it was also admitted that the mortgage was executed in good faith, to secure a *bona fide* debt due from them to Miller.

The value of the scow was admitted to be £125; and thereupon a verdict was entered for the plaintiff for that sum, subject to the opinion of the court upon the facts of the case.



It was understood at the trial, that if it should be found that the plaintiffs could only claim the share of the scow which Cheney transferred, then that the verdict should be entered only for half the value.

*Duggan*, for the plaintiff, contended—1. That one of the mortgagors having executed the instrument in Buffalo, in the state of New York, and the witness to his signature being sworn before the mayor of Buffalo, the statutes were not complied with, and therefore, so far as the interest of Knox, one of the mortgagors, was concerned, nothing was transferred thereby. 2. That the affidavit of the mortgagee was defective in two respects: first, that there was no sufficient jurat to shew where the oath was administered by the commissioner, or before whom sworn; and that the deponent described his name with an initial letter for a second name. 3. That though the affidavit of the witness to the signature of the mortgagor who executed in Buffalo stated he saw both mortgagors execute, yet in truth he only saw the one do so.—He cited *Walton v. English*, 3 Jur. N. S. 294; Ch. Arch. Prac. 689, 1521-2; *Allen v. Thompson*, 2 Jur. N. S. 450; *Heward v. Mitchell et al.*, 11 U. C. R. 625.

*M. C. Cameron*, for the defendant, argued that the mere execution of the instrument in Buffalo by one of the mortgagors, would be no reason why it might not be properly recorded at Brantford, upon a proper affidavit, and that the execution by the other mortgagor at Brantford (they being partners) might well pass the property, and the mortgage might be properly recorded or filed, upon an affidavit of the due execution by one of the mortgagors. That the affidavit made by the mortgagee was not void, though irregular, because it sufficiently appeared by the description of the commissioner who administered the oath, that he was a commissioner for the county of Brant, and it would be presumed that he did administer the oath within his jurisdiction. He cited *Fox v. Rose*, 10 U. C. R. 18.

ROBINSON, C. J.—to lay a foundation for the objections taken, I think it was necessary first to shew that the mortgagee did not take and retain actual possession of the scow,

for otherwise there could be no necessity for filing the mortgage.

Supposing this foundation laid, and the parties have argued the case as if that was conceded, then I think Thistlethwaite's affidavit sworn at Buffalo would go for nothing, because the execution of the mortgage must be proved, as the 12 Vic., ch. 74 requires, by an affidavit sworn before a commissioner for taking affidavits in this province. Still there is an affidavit by McBrien, the other subscribing witness, who swears that he saw both the mortgagors execute, and we should have no right to assume that that affidavit is not true in fact. But here, as I learn from the report of the case, it is conceded that McBrien did really not see the mortgage executed by Knox, though he swore in his affidavit that he did. The whole thing was most irregularly done, not, as I suppose, from any thing wrong being intended by any one, but from an extraordinary want of attention and care. Both the witnesses were allowed to swear to what was not true, they relying, I dare say, that the affidavits were properly prepared, and not taking the trouble to examine and consider the contents.

Then the question is, what is the effect of an error in this respect; that is, of the affidavit of McBrien being untrue in fact, inasmuch as he only saw one of the mortgagors execute, and not both. The statute 12 Vic., ch. 74, sec. 1, says the mortgage (where possession of the goods is not changed) shall be void, unless the mortgage or a copy thereof, *together with an affidavit of a witness*, sworn before a commissioner, &c., of the *due execution of the mortgage*, shall be filed as directed in the act. Now here this has been done, taking the words of the act literally. The clerk received the instrument, proved as it was, by a proper affidavit, and he filed it. The end of the legislature therefore was attained, for the public had by this means the notice of it which it is the object of the act to give. The clerk would never in such cases think it necessary to inquire into the truth of the statement contained in the affidavit, any more than a county registrar does when he receives a conveyance of land properly proved for registration, or the clerk of the

crown when he issues a *capias* upon an affidavit swearing to a debt.

If the county clerk had reason to know in such a case that the affidavit was untrue in fact, I do not say that he should passively lend himself to a fraud, or not at least endeavour to have that which was wrong made right; but it does not appear to me that we should go behind the proceedings, and inquire into the truth of facts, when the statute had been complied with, and its object answered, and where there is no suggestion of fraud. Of course, if the mortgage was not in fact duly executed, that could always be shewn, and the going through the form of filing it with the county clerk would not make it a valid mortgage: see the fourth clause of the act. And it would seem reasonably to follow, that where a *bona fide* mortgage, which this is admitted to have been, has been in fact duly executed by the parties, and all those forms observed which the statute prescribes, it should not be held invalid; though undoubtedly it was wrong in the witness, if he was aware of the terms in which the affidavit was drawn, to swear that he had seen the two execute when he had only seen one; and if he made the false statement knowingly he would be liable to the consequence of committing perjury. But according to the evidence and the admissions of the parties, we have here (so far as this objection is concerned) these two things concurring, namely: the due execution of a mortgage *bona fide* made, and the filing of it by the county clerk, which had the effect of giving to the public the notice intended; such filing, moreover, having taken place upon the production of all that the statute prescribes.

There have been some decisions in England upon the annuity acts, 17 Geo. III., ch. 36, and 53 Geo. III., ch. 141, which have a bearing upon this question, though they are not perfectly applicable, because in these acts certain forms and conditions are prescribed and imposed, and the statutes are express that where they are not observed the annuity deed shall be "*absolutely void to all intents and purposes.*" This had made it difficult for the court to overlook the slightest defect or irregularity, yet the cases of *Orton v.*

Knight (3 B. & P. 153) and of Buckeridge v. Flight (6 B. & C. 49) apply strongly, I think, to shew that in a case like this before us, where all had been done that the statute requires, so that the public had notice of the deed, which was in itself honest, and was duly executed, the deed should be upheld.

In the latter case, which was decided in error, Abbott, Chief Justice, observes: "The effect of the act, when its provisions are not complied with, is to defeat deeds solemnly executed, and therefore we ought not in our construction to go beyond the words of the enactment." Holroyd, J., said: "Where acts of parliament vary or take away the rights of parties they ought to be strictly construed," Now here, if we construe this act strictly, what it requires is that the deed shall be produced, together with an affidavit of its due execution made by a witness thereto, whereupon it is to be filed; and all this has been done. The case of Buckeridge v. Flight a good deal resembles this, because in that case the memorial of the annuity deed stated that it was executed in the presence of D. C. and W. W., the subscribing witnesses, whereas the fact was that one of the grantees of the annuity, a party to the deed, did not execute till after it was enrolled. It was argued that when the memorial stated that it was executed in the presence of D. C. and W. W., that would lead any one to suppose that all the parties executed in the presence of those persons, and if the fact were otherwise the memorial would have a tendency to mislead. But the court answered, that the act had been complied with; and that if the legislature meant to require that the execution of a deed by every person to be charged therewith, should be attested, there should have been a distinct provision to that effect. I cite this merely as confirming my impression, that we are not to look out of the act to find objections which would make a good deed void for want of being properly filed or registered.

As to those objections which apply to the affidavit made by Miller, the mortgagee, one is that the second christian name of Miller, in the body of the affidavit, is not written in full, but the initial letter only given. This is not fatal



There is nothing in the act, or in any other act, or rule of court, which makes an affidavit for any purpose inadmissible on that ground. One christian name is given in full, and we are not to know that the "M." after Ebenezer stands for another christian name. It may be intended for nothing more than to distinguish the deponent from another Ebenezer Miller.

The other objection is, that the affidavit does not state in the jurat that it was sworn by a commissioner who had authority to administer the oath, because the commissioner signed as commissioner of this court for the county of *Brant* but the jurat does not state that he administered the oath at any place within the county of Brant.

The statute only requires that the affidavit of due execution shall be sworn before a commissioner of the Queen's Bench. It does not direct that it shall shew on the face of it where it was sworn, though it is very desirable that it should, because that enables us readily to ascertain whether it was sworn before a proper commissioner; and therefore the courts properly enact that all affidavits to be used before them in the course of practice in the court shall specify the place at which they were sworn; but this is an affidavit called for by an act of parliament, which lays down no rule as to the form in which it shall be authenticated. It has been received by the public officer, who is required by the statute to act upon it; and being so received, it has done its office, in leading, as it has done, to the registration of the mortgage.

I have no doubt that if the commissioner had in fact authority to administer the oath, there would be no difficulty in prosecuting for perjury, if the statement in the affidavit were false. We should not assume that he had not authority, but rather that he had, when there is nothing before us to shew the contrary.

Then how does it appear on the face of the affidavit. It is entitled in the county of *Brant*, for which county Mr. Malloch, in the jurat, states himself to be a commissioner, and the county of Brant is mentioned in the body of the affidavit.

I think, to make sure of the jurat, we should reject the

word, "the" before "Brantford," and the word "of" after it, and read it thus, "Sworn before me at Brantford;" and doing so, and looking at what is elsewhere written in the affidavit, we can have no doubt in our minds, that if it was sworn at Brantford it was sworn at that Brantford which is in the county of Brant, for we know judicially that there is no such county as Brantford, while there is a county of Brant.

After all, however, if a party were moving the court on such an affidavit, to set aside a proceeding for irregularity, or offering to use in the court for any purpose, we might find it quite proper, if not necessary, to say to him that it was not so taken as to conform to our rules of practice, and could not therefore be admitted.

But this affidavit has been used and acted upon, not in our court, but in carrying into effect an Act of parliament, which prescribes nothing as to the form of the jurat; and till it is shewn to us that was sworn before a commissioner who has no authority to take the oath, I do not think we can deprive a party of his property, because something is not stated on the face of the affidavit which the statute does not require to be there stated.

I think the *postea* should go to the defendant.

MCLEAN, J.—By the 12th Vic., ch. 74, sec. 1, every mortgage of goods and chattels not accompanied by an immediate delivery, and followed by an actual and continued change of possession, is declared to be void against creditors or subsequent purchasers or mortgagees for good consideration, unless such mortgage, or a true copy, together with an affidavit of a witness thereto, sworn before a commissioner of the Queen's Bench, of the due execution, shall be filed as required by the next section, in the office of the clerk of the District Court in the district in which the mortgagor resides, or if not resident in the province, then to be filed in the office of the District Court where the property mortgaged shall be at the time of the execution of the instrument. The affidavit taken before the mayor of Buffalo as to the execution of the instrument by Knox, was not a compliance with

that section of the statute, and the mortgage would be void against creditors, or subsequent *bona fide* purchasers or mortgagees, if that were the only affidavit accompanying it; but there is an affidavit from another subscribing witness, which is in strict conformity with the statute. How then can the mortgage be declared void as to these plaintiffs, who are subsequent purchasers, when all has been done on the part of the mortgagee which was necessary to the validity of his mortgage. It is admitted that the affidavit which proves the execution by the two mortgagors is incorrect, and that only one of them executed is in the presence of the party who made that affidavit; but the incorrectness of the affidavit cannot affect the validity of the mortgage when once filed according to the provisions of the statute. When so entered, with the necessary affidavit of execution, and an affidavit of the mortgagee under 13 & 14 Vic., ch. 62, as to the good faith of the transaction, the objects contemplated by law are attained, and any person interested may have notice of the prior incumbrance or transfer of property by a debtor, and a certain extent of security is given against a fraudulent assignment. Registry of a deed cannot be questioned on the ground of the affidavit being incorrect.

I think, therefore, that the statute having been in fact complied with, the mortgage was a valid security from the time it was entered in the office of the Clerk of the County Court in the County of Brant; and that we cannot declare it void because it now appears there was a mistake in the affidavit of the subscribing witness, upon which affidavit it was entered.

Then there is an objection as to the jurat of the affidavit of Miller, the mortgagee, that it does not show in what county it was sworn. There is certainly an irregularity in the jurat, and great carelessness exhibited on the part of the commissioner who took the affidavit. It is entitled in the County of Brant, and purports to be sworn at *the* Brantford of—— in the County of Brantford, on the 13th of October, 1855, and it is signed by the commissioner as a commissioner for taking affidavits in the Queen's Bench in and for the *said* County of Brant. Now if the word *the*, which is printed

in the form before Brantford, is rejected as surplusage, the affidavit will appear to have been sworn at *Brantford*: and the insertion of the county, or any mistake in the insertion of the county, as the County of *Brantford*, when in fact there is no such county, instead of the County of Brant, must become immaterial. The affidavit is entitled in the County of Brant, and the commissioner signs himself as a commissioner for taking affidavits in that county, and we may therefore assume that it was taken within the jurisdiction of the commissioner.

But under any circumstances I do not think we are obliged to look at the jurat to an affidavit of this description with the same strictness as if it were an affidavit to be used in a proceeding in court, and governed by a rule of court. If the place were altogether omitted at which the affidavit was sworn, it would nevertheless be an affidavit containing all that the statute requires; and if untrue, perjury might be assigned on it, and a prosecution sustained, on proving that it was sworn within the County of Brant, before a commissioner for that county, just as effectually as if the name of the place where it was sworn were correctly inserted in the jurat.

As to the use of an initial letter in the name of a party making an affidavit, it has already been held that if the first name be given in full, with an initial letter indicating that the party has another christian name, it is sufficient; and for this reason, that in very many instances the use of an initial letter is assumed merely as a designation of a particular person, and is not the initial of any name.

Upon the whole I think the verdict for the plaintiffs must be set aside, and a verdict entered for the defendants.

BURNS, J., concurred.

Rule absolute.

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# TERRY V. THE MUNICIPALITY OF THE TOWNSHIP OF HALDIMAND.

*By-law—Shop licenses to sell liquors—Power of municipalities—16 Vic., ch. 184, sec. 3, sub-sec. 2.*

A by-law directing the clerk of the municipality to grant licenses to sell spirituous liquors for the year to two parties named, and that no such licenses should be issued to any other persons—*Held*, good.

Where the operation of a by-law is spent, it will not be quashed.

*Read* obtained a rule *nisi* on defendants, to shew cause why by-law 114, passed by the municipality, also by-law 129, both limiting the number of licenses to be issued to shop-keepers to sell spirituous liquors, should not be quashed, wholly or in part, as illegal, on the ground that they grant exclusive privileges to certain persons named therein, by ordering that no such licenses shall be issued to any person for the period stated in the by-law, except to certain persons named in each by-law respectively.

By-law 114 was passed on the 1st of March, 1856. It enacted that it should be the duty of the clerk of the municipality to grant licenses to sell spirituous liquors during the year 1856, to Wm. Taylor, of the village of Grafton, to be sold in his store only. Also to grant a license as aforesaid to the firm of Campbell & Pym, in the township of Haldimand, to be sold in their store only, in Campbell-Town, near Grafton. And that no license should be issued by the clerk to any person or persons whatever, for the purpose before stated, save and except to those persons, as thereinbefore provided; and it repealed so much of a former by-law (82) as was inconsistent with this by-law.

By-law 129 was passed on the 28th of July, 1857. It made it the duty of the clerk (by the same form of words as in the other by-law) to grant licenses to sell spirituous liquors, during 1857, to William Taylor, of Grafton, and to the firm of Campbell & Pym, in Campbell-Town, under the same restrictions; and in the same form of words it prohibited the clerk from granting a license to any other person whomsoever. This latter by-law further enacted, that if any person should offend against this by-law, or any part thereof, he should upon conviction, or confession thereof, before a justice of the peace, forfeit and pay for each offence

a sum of not less than £5, with costs, &c., and in default should be committed to the county gaol for not less than 10 days, or more than 20. And it repealed so much of by-law 82 as was inconsistent with this by-law.

Henry Terry, the applicant, was a merchant in Haldimand. He swore that on the 20th of December, 1856, he was convicted before two justices of the peace for an alleged offence against the by-law 114, in selling liquor without a license: and a fine, with costs, levied upon his goods; and that on the 11th of April, 1857, he was convicted before three justices of the peace for an offence against by-law 129; and he annexed a copy of the conviction, which shewed that £4 fine was imposed, and 17s. 9d. costs, which he said had not yet been levied. This conviction stated the offence to be against the by-law 119, and the statute in that behalf. He swore that one of the convicting justices on both occasions was the reeve of the township.

The clerk of the municipality swore, that the only applications for licenses in 1856, were from Taylor, Campbell and Pym, and Henry Terry; and for 1857, the first two only, and not Terry.

The by-law No. 82 referred to was passed on the 11th of February, 1854. It related to licenses to be issued to persons for selling spirituous liquors by *retail* other than tavern-keepers. The two other by-laws, it will be observed, were not so confined to licenses for retailing, but extended to all selling of spirituous liquors.

This by-law 82 provided, that after the 1st of March (1854) no person should sell in Haldimand spirituous liquors by retail except in tavern, &c., unless licensed under that by-law. It made it lawful for the clerk, thereafter, on payment of £7 10s. to issue licenses to retail spirits, wine, &c., in any place in Haldimand to be mentioned in the license, other than in taverns, &c., *to such persons as should apply for the same in writing*, which license should be in force to the last day of February after its being issued. In another clause it provided that the clerk, on payment of £7 10s., should *issue* a license to the persons applying, in the order in which they should be applied for.

This by-law contained provisions also for regulating the conduct of persons selling, and providing for the punishment of those offending against them.

In answer to this application the Reeve, John Wilson, made affidavit, that Terry, the applicant, kept a store in a village called Vernonville, which was composed of his store, a blacksmith's shop, in which the post office was kept, a shoe-maker's shop, and a small grocery: that he had a license to sell liquor, which expired in February, 1856, that the giving a license to Terry had given great dissatisfaction in the neighbourhood and that petitions were produced, numerously signed by inhabitants of ward No. 3, in which Terry's shop was situated, earnestly entreating the municipality not to license Terry, or any one else, to retail liquor in that neighbourhood. These were presented in February, 1856, and February, 1857, That there were *four* licensed taverns in Haldimand, and only six stores in the township, besides Terry's, of which four were in Grafton: that neither Terry nor any other person, except those mentioned in the by-law, applied for license this year, (1857); and the only places where it was at all necessary there should be shops for retailing liquors in Haldimand, were those named in the by-law.

*J. D. Armour* shewed cause.

Coyne and The Municipality of Dunwich 9 U. C. R. 448; Barclay and The Municipality of Darlington, 12 U. C. R. 86; Greystock and The Municipality of Otonabee, 12 U. C. R. 458; 16 Vic., ch. 184, sec. 3; 13 & 14 Vic., ch. 65; 12 Vic., ch. 81, sec. 116, were cited.

ROBINSON, C. J.—The applicant, as to one of his objections, relies on the judgments in the cases of Barclay and The Municipality of Darlington (12 U. C. R. 86) and Greystock and The Municipality of Otonabee (12 U. C. R. 458); but we do not think they can be pressed so far as to support this application.

It was tavern licenses that were in question there, not shop licenses. The municipality had in those cases granted only one tavern license for the whole township, which gave

a strict monopoly to one person, and excluded all competition, so that the one person licensed could exact whatever he pleased for the liquor he retailed. We thought that manifestly unreasonable and objectionable; and besides, the power given to them to limit the number of *inns* and *shops*, in a township, &c., was not fairly exercised by allowing only one inn and one shop; and what further weighed with the court in these cases was, that it was not till after the municipality had found that they could not obtain the assent of the inhabitants to a total prohibition, by a proceeding such as the 4th section of the act 16 Vic., ch. 184, required, that they resorted to the very unusual measure of licensing one inn only in a township, and that not in a situation which shewed that the object was the convenient accommodation of the public.

We held that we could not but look upon that as a contrivance by the Municipal Council to do that indirectly which they could not do directly, and in the manner required by the legislature: that it was not a *bona fide* exercise of the discretion of limiting the number of licensed taverns, with a view to a reasonable and convenient accommodation, and, so far as could be managed, the equal accommodation of the inhabitants of the township; but that it was in reality a prohibitory measure as to its general effect and tendency, and was intended to evade the legislative enactment, which gave to the inhabitants of the township a direct vote upon the question of prohibition.

The circumstances of this case are different. This by-law allows the licensing of *two* shops to retail liquors in a township, in which there are four licensed taverns besides. Then there is a competition allowed. The privilege is not confined to one person, but is literally given to a *number of persons*, though to be sure, the smallest number possible, if there are to be more than one.

The two shops are also in the business part of the township, to which we may suppose the inhabitants would at any rate chiefly resort for such things as they may have occasion to buy.

Moreover, there have been, it seems, no other applications



for shop licenses, except for one of the years in question, on the part of the person moving to quash this by-law; and as it is alleged, and not denied, that he has been twice convicted of retailing liquors without license, he does not stand in a particularly favourable position in making this application.

The inhabitants generally seem satisfied with having but the two shops licensed. We could not properly, perhaps, give much weight to the circumstance of so many persons having petitioned the municipality not to license the applicant again on account of the mischief which it had produced in his neighbourhood, because we cannot appreciate the influence which such a petition ought to have so well as the Council could, to whom the petitioners are known. We only know, generally, that it is no difficult thing to get up petitions on either side of almost any question.

The point in this application which has seemed to us to require most consideration, is the fact of the Council having in the by-laws taken upon themselves to name the parties who alone shall be licensed, which accounts reasonably enough for no one else having applied.

It is singular how the council have rushed from one extreme to the other. By the by-law No. 82 they allowed every one to have a license who chose to ask for it, and to pay the sum of £7 10s., without allowing any opportunity for considering the character of the applicant, or the convenience of the inhabitants in regard to locality. By the by-law now in force only two certain persons are to have the privilege. It seems an objectionable mode of determining who shall be the two persons, by naming them beforehand in the by-law; but we do not think we can pronounce it to be illegal. The legislature, by the clause referred to, (section 3 of 16 Vic., ch. 184,) allows the municipality to limit the *number of persons* to be licensed, but makes no provision for selecting the persons. Who then is to make the selection? This clause is all that we have to look to respecting this matter. It does not give any power to the clerk to choose any of the applicants at his pleasure. It would have been indiscreet to enact that the two who applied first should get the license,

and the act does not say so. Since the statute has been silent, and since some one must determine who shall have the license when the number is limited, we cannot deny to the Council the authority to select; and if they could do it by resolution, or by verbal direction to their clerk, they can do the same thing in a formal manner by by-law.

It seems objectionable that the municipal councillors, who are selected by the popular vote, should have this kind of discretion to select; but that is a matter for the legislature to guard against, and if they are to do it at all the same influence might be brought to bear, and the same effect produced, whether they make the selection in one way or another. It does not seem a wise provision for the legislature to have made, for several reasons, but that can be easily remedied, if upon experience it is found injurious. The words in the third clause, "or for limiting the *number* of persons to whom, and the *houses* or *places* for which, such licenses shall be granted," seem, we think, to intend that the municipality are to *select* the persons, as well as to limit the number, after having limited the *number* of persons they are to limit the houses or places to be licensed. Here they have done it by naming the persons who were actually keeping the shops which they had resolved to license. They might have enacted that two shops only should be licensed, and then have specified the shops, without specifying the individuals. That would have been a literal compliance with the act, but we cannot, we think, hold the other to be illegal.

We are of opinion the 116th clause of 12 Vic., ch. 81, does not apply to inn-keepers and shop-keepers, respecting whom the legislature have made special provisions; and besides it is not under that act, but under 16 Vic., ch. 184, that these by-laws have been passed.

The first by-law, No. 114, we should at any rate not have quashed, for its operation is spent; and we do not quash that which is now in force, No. 120, for the reasons we have stated. But we cannot but think that the mode of selecting the persons does require to be better provided for by an act of the legislature, for to allow any who come first to obtain

the license would seem injudicious, and to name them in the by-law appears inconvenient, if not objectionable, for it might be that the person named might not desire the license, or might leave the house, or leave the country. It would seem more reasonable that all who chose should have been left to apply, and leave the municipality to make their selection from them. Instead of that they have passed a by-law limiting the number in effect to two, which is one part of the authority committed to them, and limiting the places; which is another part of the authority to be exercised by them; namely, to the shops of Campbell and Pym, near Grafton, and to the shop of William Taylor, in Grafton. We cannot say that it is not in substance carrying out the statute, though we think it would have been better if they had in terms limited the number of licenses only, and leaving it open to any person to apply, had afterwards selected the two from the number of applicants.

Rule discharged.

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MCDADE DEM. O'CONNOR ET AL. V. DAFOE (a).

*Sale of lands under fi. fa. against executor de son tort—Assignee of judgment—Purchase by him under execution thereon—Necessity for proof of judgment.*

Lands cannot be sold under an execution against an executor *de son tort*.

Where in an action against the defendant as executor, on a judgment recovered against the testator, the pleas were that the testator did not promise, and *ne unques* executor, and judgment was entered on the first issue only, taking no notice of the second—*Held*, that although defendant's pleading the first plea would entitle the plaintiff to succeed on the second, yet the issue should have been disposed of; and that the judgment, therefore, would not support an execution against the defendant as executor.

*Held*, also, that the defendant in this case, who had purchased the judgment in the Court of Request, at whose instance the action on it was brought, and who had purchased the land in question under an execution in that action, was bound to shew a judgment to warrant such execution.

This was an action of ejectment, brought by the plaintiff, who was guardian of the lessors, to recover possession of land in Belleville, in the Victoria district. At the trial, it was proved, on the plaintiff's part, that one John O'Connor had had possession of the lands in question for several years, had conveyed a part of the same tract, and had died in pos-

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(a) This case was decided in Easter Term, 1849, but was accidentally omitted in the reports of that term.— See the next case.

session of the remainder, which was sought to be recovered in this action, leaving it devised by will to the plaintiff's lessors.

For the defence, *Mr. Wallbridge* put in an exemplification of a judgment and *feri facias* against goods, and *feri facias* and *venditioni exponas* against lands, in a suit of *Timothy Simmonds v. Ann O'Connor*, executrix of *John O'Connor*, in the District Court of the Midland district; also a deed from the sheriff of the Midland district to the defendant reciting a sale of the premises mentioned in the consent rule, under said judgment and executions, as being lands in the hands of *Anne O'Connor*, executrix *de son tort*, under which said defendant claimed.

At the trial, *Mr. Kirkpatrick*, counsel for the plaintiff, objected to the writ of *feri facias*, and the judgment. He contended that the judgment against *Anne O'Connor*, as executrix, was not warranted by the finding of the jury, as it appeared on the record: that there were two issues to be tried; first the promise of *John O'Connor* in his lifetime; and secondly, the question whether *Anne O'Connor* was or was not executrix: that by the record the jury were only impanelled to try the issue as to the promise; there being on the record no finding on the question of whether *Anne O'Connor* was or was not executrix.

*Mr. Wallbridge* contended, that the purchaser's title could not be overturned by any irregularity or defect in the judgment: that the execution to the sheriff, and his authority to sell, were strictly legal; and that defendant was not bound to go further back to ascertain whether the judgment was proper or not.

It was admitted by defendant's counsel that the defendant purchased the judgment in the Court of Requests in favour of *Simmonds*, and that the action in the District Court on that judgment was brought at the instance of, and for the benefit of the defendant, and that he was the party interested in the sale of the lands.

*Mr. Kirkpatrick* contended, that the defendant not being a stranger, but the party really interested in the judgment, was responsible for its correctness; that, as his title was founded on it, if it be defective the title must fail; and that



the heirs of John O'Connor could not be deprived of their lands by a sale under execution against Anne O'Connor, who was not found to be executrix of John O'Connor. It was admitted that Anne O'Connor was sued, and the judgment against her recovered, as executrix *de son tort*.

A verdict was taken for the plaintiff, subject to these points.

ROBINSON, C. J., delivered the judgment of the court.

It has been certainly a singular train of facts which forms the foundation of the defendant's title in this case, which title he sets up against the plaintiff's right to recover.

The plaintiff shews a *prima facie* title, under a devise from John O'Connor, who was proved to have been long in possession of the land, and to have died in possession. The defendant, against this title, sets up a deed to himself of this property, made in consequence of a sale in execution at the suit of one Simmonds.

It appears that Simmonds, on the 4th of June, 1836, had obtained judgment in a court of Requests, in the Midland district, against John O'Connor, for a small debt, and that this judgment was sold and assigned by the plaintiff, Simmonds, to this defendant, Dafoe, who brought afterwards an action in the District Court, upon the judgment against Anne O'Connor, as executrix of John O'Connor, who had died in the meantime. Anne O'Connor pleaded—1st. *Non assumpsit*, and 2ndly, that she was never executrix, upon which pleas issue was joined; and on the 5th of March, 1840, judgment was entered in the District Court, in favour of the plaintiff, but only on the issue of *non-assumpsit*, taking no notice of the other issue, which denied that she was executrix. On this judgment a *fi. fa.* issued against the goods of John O'Connor *in the hands of Anne O'Connor, as his executrix*, which being returned *nulla bona*, an execution issued against the lands which were of John O'Connor in the hands of Anne O'Connor, his executrix, to be administered. To this writ the sheriff returned that he had seized lands, which remained unsold for want of buyers; and on the 15th of January, 1842 a writ of *venditioni exponas* issued, under which the sheriff, on the 23rd of July, 1842, sold the lands now in question to

the defendant in this action, William Dafoe. The deed was made by the sheriff to Dafoe on the same day, in which deed it is recited that the sheriff had been commanded, by writ of execution, to sell the lands and tenements which were of John O'Connor, deceased, in the hands of Anne O'Connor, *executrix de son tort to the said John O'Connor*, to be administered.

It is admitted, in the case stated to us, that Anne O'Connor was not rightful executrix : that the testator by his will had appointed two executors, who proved the will, but never acted, in consequence of which administration with the will annexed was granted to another person.

Then there are these questions in the case :

*First.* Although the judgment in the District Court establishes that Anne O'Connor did undertake and promise, yet there is no judgment, and no finding of the jury, on the other issue, denying her executorship, and consequently on the judgment no right appears to have execution against her as executrix of John O'Connor. It is argued that a good writ is all that need be shewn by a purchaser at sheriff's sale ; and that is true, when it is a stranger to the judgment who purchase under the execution ; but that is not the case here, for Dafoe became the purchaser of the judgment, and he was the person at whose instance the second action was brought, and the writ of *fi. fa.* sued out on which the sale took place. We consider that upon a general principle of law, he can stand in no better position, as far as regards the necessity of proving a judgment to warrant the *fi. fa.*, than the creditor whose right he purchased ; and that the judgment shewn does not support the writ, for the writ directs a debt to be levied of the lands of John O'Connor, of whom it states Anne O'Connor to be executrix, when the judgment roll shews that she expressly denied her being executrix, and it was not found or adjudged that she was. For all that appears, the land of John O'Connor might as well have been sold under a judgment against any one else.

Then it is admitted in the case that there were rightful executors, who proved the will, and never renounced, and that Anne O'Connor was not in fact a rightful but a wrong-

ful executrix ; or rather that it was only in that capacity that she was proceeded against. This brings up the question, whether lands can be legally sold in this province under a judgment against an executor *de son tort*. If it were necessary to decide in this case, I should give my present opinion that they could not be. In the case of Gardiner v. Gardiner (1 O. S. 520) this court determined that lands could not be sold under a judgment against the personal representatives of a deceased debtor ; and the reasons on which that decision, which was not unanimous, was founded, are very full stated in the judgment. This is an attempt (the first we believe,) to make lands saleable under a *fi. fa.* against the wrongful executor. We are not prepared to uphold it. An executor *de son tort* has no legal control over the personal estate even of the deceased, and has no authority to collect the effects. He cannot maintain an action in right of the deceased. You can reach through him nothing but his own goods, or the goods of the estate which can be traced to his hands. Our statute 43 Geo. III., ch. 1, requires, for the protection of the heir, that the personal estate of the debtor shall be exhausted before the lands can be sold ; but a return of *nulla bona* to a *fi. fa.* against a wrongful executor, who has no authority to collect the goods of the estate, affords no proof that there may not be abundance of personal assets to satisfy the debt ; and for this reason, even if there had been a judgment to warrant an execution against Anne O'Connor, as executrix, we are of opinion that the real estate of John O'Connor could not be sold under a *fi. fa.* against her ; the fact being, as it is admitted to be, that she does not rightfully represent the testator, but is at most an executrix in her own wrong, having no connection with the assets of the estate, except such of them as she may be proved to have wrongfully intermeddled with.

We think the *postea* must be awarded to the plaintiff.

It should be remarked that in the action in the District Court, upon the judgment upon the Court of requests, Anne O'Connor pleaded that John O'Connor did not undertake and promise, and that the fact of her pleading such a plea entitled the plaintiff in that action to succeed upon the issue

of *ne unques* executor; but nevertheless the issue should have been disposed of, and a judgment entered upon it, before any *fi. fa.* could legally issue.

Judgment for plaintiff.

### WRATHWELL V. BATES.

*Held*, affirming McDade dem. O'Connor et. al. v. Dafoe, ante, page 386, that real estate cannot be sold in this province under an execution obtained against an executor *de son tort*.

EJECTMENT for lot No. 21, in the 5th concession of the township of Walford.

At the trial before *McLean*, J., at the last spring assizes at Brockville, a verdict was taken by consent for the plaintiff, and 1s. damages, on the following facts.

Samuel Wrathwell, the father of the plaintiff, died seized of the premises, and intestate, the plaintiff, his heir at law, being then a minor. At the time of the death of Samuel Wrathwell he was indebted to S. S. Easton. No letters of administration were taken out, but the goods of the estate remaining in the hands of the widow, and being by her used and supplied for the benefit of herself and family, Easton brought an action, and recovered judgment against her *as executrix of the last will and testament of Samuel Wrathwell*. The lot in question was sold by the sheriff on the execution issued against lands in that suit, and was purchased by S. S. Easton, who received a deed from the sheriff, and subsequently sold to the defendant for a valuable consideration. It was further admitted that the plaintiff was an infant at the time of the sheriff's sale, and at the time of the conveyance by S. S. Easton to the defendant.

Leave was reserved for the defendant to move for a non-suit, if in the opinion of the court the plaintiff was not entitled to recover on the facts admitted; and it was agreed that the plaintiff's right to recover for *mesne* profits should not be affected by the verdict rendered by consent.

*Albert Richards* obtained a rule *nisi* accordingly. He cited *Forsyth v. Hall*, *Dra. Rep.* 304; *Doe Smith v. Shuter*, 5 O. S. 655; *Ward v. McCormack*, 6 O. S. 215; *Seaton v. Taylor*, 3 U. C. R. 303; *Ruggles v. Beikie*, 2 O. S. 347;



Turner v. Cox, 21 L. T. Rex. 173; Paull v. Simpson, 9 Q. B. 365; Thompson v. Harding, 2 Ell. & Bl. 630; Oxenham v. Clapp, 2 B. & Ad. 309.

*Sherwood*, Q. C., shewed cause, and cited *Graham v. Nelson* 6 C. P. 280; *McDade* dem. *O'Connor v. Dafoe*, ante, page 386; *Williams on Exrs.* Am. Ed. 224, note 2; *Nass v. Van-swearingen*, 7 Serg. & R. 192, 10 Serg. & R. 144; *Green v. Dewit*. 1 Root 183.

ROBINSON, C. J., delivered the judgment of the court.

This point, whether real estate can be legally sold in this province under an execution against an executor *de son tort*, has already been determined in this court, and in more than one case; and it has also been determined in the court of Common Pleas, that the lands of a deceased debtor cannot be sold under the 5th Geo. II., ch. 7, under an execution against a party who does not rightfully represent him.—*Graham v. Nelson et al.* (6 C. P. 280).

We think it was in the case of *McDade* on the demise of *O'Conner v. Dafoe* that the point first came up, and in a case like the present, where the purchaser at the sheriff's sale was the plaintiff in the *fi. fa.*, and therefore bound to take care that the proceedings were regular, or at least illegal.

By some accident that case seems not to have been printed. We therefore refer to the grounds of the judgment as stated in it, and the case itself as reported with this, for the information of the profession (a). We adhere to that judgment, and discharge this rule, which leaves the heir of the deceased debtor in possession of the verdict.

Rule discharged.

### TOTTEN V. WATSON.

*Sale of land by Indians—13 & 14 Vic., ch. 74.*

The 13 & 14 Vic., ch. 74, which prohibits the sale of land by Indians, applies only to lands reserved for their occupation, and of which the title is still in the crown, not to lands to which any individual Indian has acquired a title.

EJECTMENT for the north half of lot 24 in the 16th concession of Rawdon.

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(a) Ante, page 386.

Defence for the whole.

At the trial at Belleville, before *Hagarty*, J., it was shewn that the crown, on the 30th of June, 1801, issued a patent to Captain John Desorontyon, a Mohawk chief, living on the Bay of Quinté, for 1200 acres of land, including the hundred acres in question. He had three sons, John, William, and Peter. John died intestate before his father, but leaving lawful issue, his eldest son and heir, William John. Afterwards the patentee died intestate. His son William had died before the eldest son John, leaving no issue. Peter survived his father.

In 1856, William John, the grandson and heir of the patentee, being the eldest son of his eldest son John, conveyed by bargain and sale to the plaintiff, William Totten, for a consideration of £7 10s. He was examined upon the trial, and said the price was named by himself, and that he was quite satisfied with it. He had never been in possession of the land, nor so far as he knew had his father or grandfather. The deed was read to William John, before he signed it, and he had before sold the other half of the lot at the same price. The plaintiff had been in possession of the 100 acres long before he took this deed.

It was objected against the plaintiff's title, that the grantor, William John being an Indian, was prevented by statute 13 & 14 Vic., ch., 74, from disposing of his land.

And it was proved that the same William John who made the deed to the plaintiff in 1856, had on the 20th of July, 1842, executed a conveyance by bargain and sale of 1000 acres of land, including the 100 acres in question in this action, to one Cuthbertson, for a consideration expressed of £100.

William John swore upon the trial that he was imposed upon when he was got to execute that deed in 1842: that Cuthbertson, who was his cousin, never gave him any consideration for the land; and that he was persuaded that the paper he signed was merely an authority to Cuthbertson to look after his land for him.

On the other hand, a subscribing witness to the deed, and the attorney in whose office it was executed, swore that

William John knew well the nature of the deed that he was executing.

The land was proved to be worth at the time of the trial about nine hundred dollars.

It was left to the jury to find—1st. Whether William John knew what he was doing when he executed the deed to Cuthbertson, or whether he was imposed upon by the grantee, and made to execute an instrument which was represented to him to be of a different kind from what it was. 2ndly. Whether it was a voluntary deed, without consideration. 3rdly. Whether when that deed was executed there was any one in possession, holding adversely to William John. 4thly. Whether the deed made by William John to the plaintiff in 1856, was a voluntary deed, or made for value.

The jury found, that William John was imposed upon, and did not know what he was doing, when he signed the conveyance to Cuthbertson: that he received no value from Cuthbertson for the land: that no person was in possession holding adversely to him at the time; and that there was value given to William John by the plaintiff for the conveyance which he took from him.

It appeared that in 1842, if not before, some squatters had gone upon the land, who were succeeded by some one else, and after several others had been in possession the plaintiff bought out the last person some years before he took out his deed, and cultivated the land, and had about forty acres cleared.

A verdict was rendered for the plaintiff, and both parties agreed that upon the evidence and the finding of the jury. the court should direct a verdict for either party, according to their opinion of the right.

*Jellett* obtained a rule *nisi* to enter a verdict for defendant, to which *Henderson* shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

The only question to be determined is whether the statute 13 & 14 Vic., ch. 74, secs. 1 & 2, affects this case. That enacts "That no purchase or contract for the sale of land in Upper Canada, which may be made of or with the

Indians, or any of them, shall be valid, unless made under the authority and with the consent of her Majesty, her heirs or successors, attested by an instrument under the great seal of the province, or under the privy seal of the governor thereof for the time being."

If we construe this provision by itself and literally, it will extend to the deed made by William John, an Indian, in 1856, to the plaintiff, of land which the crown had granted by patent to his grandfather, in his natural individual capacity, and which the grandson took by descent, as any other subject of the Queen in this Province would do. But if we look at the scope and intention of the statute, we find much reason to conclude that this enactment could only have been meant to extend to what are understood by the term "Indian lands;" that is, lands which the crown had reserved for the occupation of certain Indian tribes, but of which the title is still in the Queen: and not to land which an individual Indian has either acquired by purchase, devise, or inheritance, or by grant from the crown made to himself as an individual.

In the case of *The Queen v. Baby*, in this court (12 U. C. R. 346), we had occasion to consider this point, though it was not necessary that we should determine it. In this case we are called upon to do so. The conclusion we come to, on a view of the whole act, is that it is not meant to extend, and does not extend, to any but Indian lands properly so called. If the enacting part of the first clause stood alone, it would clearly take in this case, for it would extend literally to all lands in Upper Canada that any Indian might attempt to sell; and we should find it not difficult to suppose that the legislature might possibly have intended to protect the Indians to that extent, for they are a helpless race, much exposed, from their want of education and acquaintance with business, and the intemperate habits of many of them, to be taken advantage of in their dealings with white people.

But the title and preamble of the act, one of its provisions in the second clause, the third clause more especially, and also the 4th, 5th, 10th, 11th, and 12th clauses, contain



strong evidence, we think, that the act, as it regards the protection of the Indians in the possession and enjoyment of their land, concerns only such lands as Indians are merely permitted to occupy at the pleasure of the crown, and not lands of which a title has been made by letters patent to any individual Indian.

From the earliest period the Government has always endeavoured, by proclamation and otherwise, to deter the white inhabitants from settling upon Indian lands, or from pretending to acquire them by purchase or lease; but it has never attempted to interfere with the disposition which any individual Indian has desired to make of land that had been granted to him in free and common socage by the crown. Very few such grants have been made, and only to leading persons among the Indians, who, like the patentee in this case, Captain John, had been treated by the crown as officers in their service, and who, it might be assumed, had sufficient intelligence to take care of their property.

In the last session of parliament, an act was passed for the further protection of the Indians, 20 Vic., ch. 26, which confirms us in the opinion we have expressed. We refer particularly to the first section of that act.

The postea, in our opinion, should go to the plaintiff.

Rule discharged.

### MAHONY V. CAMPBELL.

*Conveyance—Description of land—Reference to survey—Estoppel.*

J. A., by deed, dated 22nd of January, 1840, conveyed to the plaintiff lots 134, 135, and 136, in the third concession of Sandwich, adding this description, "which said lots were patented to the said James Askin, bearing date the 15th of March, 1836, and which was surveyed and laid off by John Alexander Wilkinson, D. P. S., on the 21st of January, 1840."

*Held*, that the plaintiff was not bound by such survey, but could claim the whole of lot 136 as laid out by Government.

Ejectment, for part of lot 136 in the 3rd concession of Sandwich.

At the trial, at Sandwich, before *Richards, J.*, it appeared that on the 15th of March, 1836, the crown granted this

lot 136, with (five other lots) to James Askin, Esq. The whole were described as containing together 421 acres, but there was no description of any of them in the patent by metes and bounds.

On the 22nd of January, 1840, James Askin made a deed of bargain and sale in fee of the said lots 134, 135 and 136, in the third concession of Sandwich, describing them thus, "containing 150 acres of land, be the same more or less, and which said lots were patented to the said James Askin, bearing date the 15th of March, 1836, *and which was surveyed and laid off by John Alexander Wilkinson, Esquire, Deputy Provincial Surveyor, on the 21st of January, 1840, fifty links having first been reserved along lot No. 127, east side, for the allowance for road.*

The question between the parties was whether the plaintiff could claim the full actual contents of the lot 130, as it had been laid out by the government; or whether he was estopped by the deed made to him from claiming more than what Mr. Wilkinson laid out as the contents of the lot.

The defendant owned lot 137 in the 3rd concession, and contended that the plaintiff must be governed by what Mr. Wilkinson laid down as the line between 136 and 137.

Wilkinson's survey, as he swore upon the trial, was made in September, 1833, at the request of the patentee, Askin, and a number of other persons. The third concession had never been surveyed into lots by any one authorised by the government, but it was proved at the trial, and conceded on the argument, that according to the intention and scheme of survey as exhibited by the plan, and always understood by surveyors, and the plan of the township, the side lines of lots in the 2nd and 3rd concessions were to be determined by protracting the side lines between the lots in the front concession on the river Detroit, which lines were run out in the original survey made by Mr. Smith, D. P. S. Mr. Wilkinson took those lines as his guide, intending to conform to them, as he stated; but surveyors who had run the lines for the plaintiff since had discovered an error in his lines, which had the effect of giving to lot 136 less than its due width by about 94 links, and depriving it of about nine acres. A verdict was taken

for the plaintiff and 1s. damages, leave being reserved to the defendant to move for a nonsuit.

*O'Connor* obtained a rule *nisi* accordingly, to which *Prince* shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

It is a significant fact that the deed under which the plaintiff claims, and which is executed by him as well as by the grantor, is dated on the 23rd of January, 1840, and that the survey by Mr. Wilkinson is stated in it to be made on the 21st of January, only the day before. This looks as if Mr. Askin and the plaintiff wished to designate with certainty the object of the purchase, in order to prevent future difficulty, and so to obviate the uncertainty arising from any previous survey of the government; and yet Mr. Wilkinson does not state in his evidence that he had made any survey in 1840; he speaks only of a survey made by him in 1833, and that not for Mr. Askin or this plaintiff in particular, but for Mr. Askin and a number of other persons. He probably went in 1840 to point out the posts he had planted in 1833, which could be easily found; and there seems no good reason to suppose from his evidence that there was any difference between his survey in 1833, and that intended to be referred to by the deed, nor that there was any survey made by Mr. Wilkinson for the special purpose of this conveyance, and distinct from the former survey.

Then we have to consider that the deed from Mr. Askin first grants the lot 136, by name, and refers to it as a lot patented to Mr. Askin on the 15th of March, 1836. That indicates an intention to grant the lot as the crown had granted it; that is, of the same contents; which it is admitted on all hands were to be ascertained by continuing the side-lines through the third concession from the river.

Then the additional words "and *which* was surveyed and laid off by J. A. Wilkinson, Esquire, D. P. S., on the 21st of January, 1840, can hardly be understood as referring to a tract of land whose dimensions were different from the lot patented, because then the words "*which* were patented to Mr. Askin, &c.," would be made by this connexion to

refer to something different from the lot actually patented, whereas it is plain that the two references were only meant to aid in describing the same thing. If the deed had granted the tract laid out by Mr. Wilkinson as lot 136, then that tract only would have passed to the grantee ; but as the deed runs, it first grants the lot as patented, and then merely gives the information (supposed to be correct) that such lot so patented was laid out by Mr. Wilkinson in 1840 ; but it seems that though Mr. Wilkinson intended to lay out that lot accurately, according to the known scheme of survey, he failed to do so, or if he did mark it out properly, his boundaries may have been afterwards disturbed.

If the parties to the deed really did mean that Mr. Askin's survey was to govern, and not the real contents of the lot, as intended and understood by the government, that intention could easily have been so expressed in the deed as to bind both parties to it ; but it is not so expressed, and we think we can only, according to well known principles of construction, look upon what is said of Mr. Wilkinson's survey as an inaccurate description of the thing actually granted, and as something superfluous, which cannot affect the subject of the grant. It was said in argument that Mr. Askin made a deed to defendant of his land, in which he also made allusion to Wilkinson's survey, but we do not see that deed in evidence.

If Mr. Wilkinson's survey intended to lay out the true lot 136, had erred on the other side, and had carried the line in upon 137, we cannot doubt that the defendant would then have contended that the plaintiff could not go beyond the true line of 136, for that alone had been sold to him.

We think the rule for nonsuit must be discharged.

Rule discharged,

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## THE CITY BANK V. CHENEY ET AL.

*Canada Grand Trunk Telegraph Co.—Liability of president and secretary on promissory note—16 Vic., ch. 19., sec. 8; 12 Vic., ch. 10, sec. 5, sub-sec. 24.*

Toronto, February 5th, 1855.

"Six months after date, for value received, we promise to pay to A. K. Boomer, Esquire, or his order, at the City Bank, Montreal, the sum of four hundred and twenty-four pounds sixteen shillings and two pence, currency, with interest from date.

GEO. H. CHENEY,  
President Gr. Trunk Telegraph Co.

F. A. WHITNEY,  
Secretary C. Grand Trunk Telegraph Co.

The seal of the company was affixed.

*Held*, that the makers were not personally liable on the above instrument, as being their promissory note.

*Quære*, whether the company were liable.

The statute under which the company is incorporated, enacts that all evidences of debt issued by them shall be issued and signed by the president and treasurer. *Semble*, per ROBINSON, C.J., that this is directory merely, and that even if the secretary who signed in this case was not the treasurer as well, it would be sufficient. Per BURNS, J., that the seal being used dispensed with the signatures of the president and secretary, the object of the enactment being to enable the company to make such contracts, if they should desire, without their seal.

This was an action on two instruments, dated the 5th of February, 1855, declared on as promissory notes.

One of them ran thus:

"Six months after date, for value received, we promise to pay to A. K. Boomer, Esquire, or his order, at the City Bank, Montreal, the sum of four hundred and twenty-four pounds sixteen shillings and two pence, currency, with interest from date.

(Signed), GEO. H. CHENEY,  
President Canada Gr. Trunk Telegraph Co.

(Signed), F. A. WHITNEY,  
Secretary C. Grand Trunk Telegraph Co.

Canada Grand Trunk Telegraph Company.
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The other was in the same form.

Both were endorsed by A. K. Boomer, the payee; and Cheney, Whitney, and Boomer, were all sued in this action.

The declaration was in the common form of an action of assumpsit on promissory notes under our statute, against Cheney and Whitney as makers, and Boomer as endorser, taking no notice of the seal of the company upon the note, nor of the additions of president and secretary to the names of Cheney and Whitney.

Cheney and Whitney pleaded, that "they did not make

the said promissory notes, in the declaration ;” and Boomer pleaded, that he did not endorse the said notes, &c.

On the trial at Toronto, before *Robinson*, C. J., it was proved that the company were in the frequent habit of giving notes in the transaction of their business, which had been made in the same form. No evidence was given to prove on what account these notes had been made. It was objected that they could not be treated as the promissory notes of Cheney and Whitney, on which they were personally liable.

A verdict was taken for the plaintiffs, for £679 6s. 6d., reserving this point for the opinion of the court.

*C. S. Patterson*, for defendants, obtained a rule *nisi* to enter a nonsuit, pursuant to leave reserved, on the exception that they were not personally bound.

*Connor*, Q. C., shewed cause. *First*, The company had no power to make such a note, and if not defendants must be liable. The 16 Vic. ch. 10, sec. 8, under which the Canada Grand Trunk Telegraph Company are incorporated, gives them no power to issue negotiable paper ; and except in the case of trading corporations, this power is not incidental. *Grant on Corporations*, 276. It is not required here to answer the purposes of their charter. *Secondly*, The company is not sufficiently named in the document ; there is nothing to designate them but the description of the parties signing, for if that was absent, no authority can be found to shew that the seal alone would be enough. *Thirdly*, The signature of Mr. Cheney alone is not sufficient, the treasurer should have signed as well ; defendants being named here, and primarily liable, must shew that the requisites of the statute on which they rely to relieve them have been strictly complied with ; and that directs sec. 8, that all evidences of debt issued by the company shall be issued and signed by the president and treasurer.—*Mare v. Charles*, 34 Eng. Rep. 138 ; *Owen v. Van Uster*, 10 C. B. 318 ; *Foster v. Geddes*, 14 U. C. R. 239 ; *MacLae v. Sutherland*, 3 Ell. & Bl. 1.

*Adam Wilson*, Q. C., (*C. S. Patterson*, and *S. M. Jarvis* with him) supported the rule. *First*, This is an evidence

of debt, within the meaning of the 16 Vic., ch. 10, sec. 8. *Secondly*, The cases in our own courts, in which officers have been held personally liable—Bank of Montreal v. Delater, 5 U. C. R. 362; and Foster v. Geddes, 14 U. C. R. 239—are clearly distinguishable. They were actions on bills of exchange, and the principle on which those and similar decisions proceed is, that when bills are drawn upon officers of a corporation, styling them officers, which is held to be matter of description only, it is necessary to hold them liable, for otherwise the acceptance and the address of the bill would not agree, and the bill would be dishonored. In Bank of Montreal v. Delatre, for instance. the bill was drawn on him as treasurer, and if the acceptance had been held to be by the company in their corporate name, it would have been in effect a dishonour of the bill; but the courts will always construe an acceptance, if possible, so as to make it an honour instead of a dishonour of the draft.—Hartford v. Cameron's Steam Coal and Swansea, &c., R. W. Company, 16 Q. B. 442; Edwards v. The same company, 6 Ex. 269; Nicholls v. Diamond, 9 Ex. 154; Mare v. Charles, 5 Ell. & Bl. 978. This, however, is a promissory note, and these cases therefore do not apply. [ROBINSON, C. J.—It is under seal]. Yes, but the authorities shew that where corporations make notes under seal they may be sued in *assumpsit*. In some cases great weight is given to the intention of the parties; and if that is to be taken into consideration here, it is quite clear defendants are not liable. If they had intended this as their own note, and had not wished to bind the company, they would not have added the corporate seal, or mentioned the corporation in any way.—Boyd v. Cheney, 5 C. P. 494; Healey v. Story, 3 Ex. 3; The Bank of Australasia v. Breillat, 6 Moore P. C. C. 152; Aggs v. Nicholson, 25 L. J. (Ex.) 348.

ROBINSON, C. J.—This corporation has been established under our statute 16 Vic., ch. 10, the 8th section of which enacts, that "it shall not be lawful for any association under this act to contract debts exceeding one-half of the amount of the capital stock of such association; and all evidences

of debt issued by such association shall be issued and signed by the president and treasurer thereof." There is nothing else in the statute that has any particular application to the question raised in this case.

We see, from the nature of the business to be transacted by the corporation, that it is in its nature a trading corporation, having occasion, as we may assume, to contract debts in the course of its business.

By our statute 12 Vic., ch. 10, sec. 5, sub-sec. 24, it is enacted, that when a statute creates a corporation, the general words of incorporation shall be construed "to vest in any majority of the members of the corporation the power to bind the others by their acts; and also to exempt the individual members of the corporation from personal liability for its debts, or obligations, or acts, provided they do not contravene the provisions of the act incorporating them; but it shall not be lawful for any corporation to carry on the business of banking, unless when such power shall be expressly conferred on them by the act creating such corporation."

We have decided expressly, in *The Kingston Marine Railway Company v. Gunn* (3 U. C. R. 368), and have in other cases generally assumed, that a trading corporation such as this may make promissory notes, in the course of transacting their proper business. Such is stated to be the law in *Grant on Corporations*, 276; and our statute 12 Vic., ch. 10, sec. 5, sub-sec. 24, appears to countenance the assumption of such a power, by restraining such corporations from carrying on the business of banking, unless when the authority to do so is expressly conferred by their charter. Moreover, the statute 3 & 4 Anne, ch. 9, sec. 1, expressly authorises bodies corporate to make negotiable promissory notes.

Then taking this to be as I have stated, (and I think we are precluded from what has long been recognized in our courts from deciding otherwise, though undoubtedly there are authorities to the contrary), the question is, whether upon such an instrument as that before us the corporation can be made liable. If it could not in any shape, then it might perhaps follow, though I do not say it would, that



the defendants would be liable upon it as a promissory note, for the language would apply at least as well to them as promisers as it would to the company, and the official signatures which they have given to themselves might be treated as mere matter of description, not restrictive of their undertaking.

This being under the seal of the company, if the payee, Mr. Boomer, were suing upon it, would clearly, I think, be an undertaking binding upon them; the words, "we promise," being applicable to the corporation, and there not being in this case those words "jointly and severally," which in some cases have created a difficulty, by indicating an intention to make the liability personal only. But this action is by an endorsee; it is therefore to be decided, whether the instrument is good against the company in the hands of an endorsee; in other words, whether it is a valid negotiable note, binding as such upon the company.

The cases of *The Bank of Montreal v. Delatre* (5 U. C. R. 362), and of *Foster v. Geddes et al.* (14 U.C.R. 239), do not apply, for those were actions upon bills of exchange, not on promissory notes, and were determined upon principles which do not apply to the case of a promissory note. It was necessary in those cases to consider upon whom the bill was drawn, and whether the acceptance was consistent with the body of the bill.

In the present case my opinion is that the note, looking only at the words of the promise, might as well be treated as the undertaking of the corporate body as of the two officers who signed it. Then we must consider by whom it is signed or executed, and we find at the foot of the promise, in the proper place, the seal of the corporation, with the superscription, "Canada Grand Trunk Telegraph Company." This makes it clearly the promise of the company, and shews what the intention was. We can only, I think, look upon the signature of the officers as being placed there for the purpose of authenticating the seal, or rather of witnessing that it was on that occasion used lawfully, with the assent of, and for the purpose of binding, the corporation. The 8th section of the statute 16 Vic., ch. 10, enacts that "it

shall not be lawful for any association formed under this act to contract debts exceeding the amount of one-half of the capital stock of such association, and that all evidences of debt issued by such association shall be issued and signed by the president and treasurer thereof."

It has been objected, that if this case can be properly regarded as a promissory note, being, as it is, under the seal of the company, yet that still as an evidence of debt it required to have the signature of the *treasurer*, which it has, not. But the note has the signature of the president, which in part complies with the act, and we cannot say that it has not the signature of the treasurer, since, for all that appears, the secretary and treasurer may be the same person, which is not unusual. At any rate, in the case of *Aggs v. Nicholson* (25 L. J. Ex. 348) the court, in a very similar case, seemed to look upon such a provision in a statute as merely directory; and whether that be a correct view of the matter or not, is a question which would come up in an action against the corporation, but is not necessary to be decided for the purposes of this action, which does not charge the corporation.

The case of *Aggs v. Nicholson* is very much in point, to shew that upon an instrument such as this, sealed with the seal of the corporation, the intent is so manifest that it was the company that was to be bound, and not their officers individually, that an action will not lie against the officers as being personally liable; and this should be so held, even if the intention to charge the company should fail in its effect from some principle of law, or from some defect in the form of the instrument.

In that case, as in this, the corporate seal was affixed to the undertaking; but the learned judges seemed clearly to think that if the corporation could make a promissory note, and the language was suitable, the putting the seal to it would not change its character, and make it a specialty, instead of a note.

Mr. Grant, in his work on corporations, had assumed the same thing before that case was determined; and it seems reasonable, for if it was meant to be a promissory note, and

not a deed, and was not declared to be sealed and delivered as a deed, it would be reasonable to look upon the seal as obtained for no other purpose than to mark the collective assent of the corporation. In *Clement v. Gunhouse* (5 Esp. 83), Mr Justice Chambre held, " that the putting a seal opposite to the name, though evidence of a deed, and one of the formalities belonging to it, was not to be taken as conclusive."

But we need not go further into that point, for the question before us is not whether the Telegraph Company can be sued upon this instrument as upon a note, but whether Cheney and Whitney are personally liable; and I think the case of *Aggs v. Nicholson* is strong to shew that they are not, and that a still later case, of *Lindus v. Melrose et al.* (29 L. T. Rep. 215, Ex.) is another authority bearing very strongly in favour of these two defendants.

In my opinion they are not personally liable on this writing as an undertaking of their own, and therefore I think the rule for a nonsuit should be made absolute.

BURNS, J.—The eighth section of the act 16 Vic., ch. 10, under which the Canada Grand Trunk Telegraph Company became incorporated, is the only material clause affecting the case before us. Under that the association might contract debts to an amount not exceeding one-half the amount of their capital stock, and the section declares that all evidences of debt issued by such association shall be issued and signed by the president and treasurer thereof. It appears to me there is great force in the argument, that a corporation like the present shall not issue promissory notes or bills of exchange—which securities are, to a certain extent, used as part of the circulating medium of the country—unless there be express authority given to do so. The cases of *Slark v. The Highgate Archway Company* (5 Taunt. 792), *Broughton v. The Manchester and Salford Waterworks Company* (3 B. & Al. 1), and *Regina v. The Town Council of Lichfield* (4 Q. B. 907), are worthy of being well considered upon the point. The Court of Common Pleas lately decided that the Buffalo, Brantford

and Goderich Railway Company had no power to grant negotiable promissory notes under the act 16 Vic., ch. 45, and that act may be looked upon as more favourable for holding that such power did exist than the one before us.—See *Topping v. Buffalo, Brantford and Goderich Railway Company* (6 C. P. 141). The argument in this case based upon the proposition is, that if the association had no power to grant negotiable promissory notes, then the notes in question should be considered as the individual notes of the defendants, Cheney and Whitney. It does not appear to be necessary to decide the question whether the Grand Trunk Telegraph Company could make negotiable promissory notes, under the provisions of the 8th section, though I must say the inclination of my mind at present is to think that the company had no such power. If it had such power, I think it should sufficiently appear upon the face of the instruments that the corporation is the party promising to pay. The case of *Aggs v. Nicholson* (25 L. J. Ex. 348), was a case decided upon the effect of the statute 7 & 8 Vic., ch. 110, sec. 45. In that case it appeared that two of the directors signed the instrument, and promised on behalf of the company to pay. The court held that the company was bound, and not the defendants individually. The seal of the company was added to the document, but nothing turned upon that fact, because it did not appear there was any necessity for affixing a seal: the two directors had power to bind the corporation by the instrument, being countersigned by the secretary. There was no necessity for considering whether the effect of sealing was to render the instrument a specialty. The latest case upon the subject, whether the corporation be bound or the individual directors, is *Lindus v. Melrose* (29 Law Times Rep. 215), which arose upon the statute 19 & 20 Vic., ch. 47. By this statute it appears that a promissory note or bill of exchange shall be deemed to have been made, accepted, or endorsed on behalf of any company registered under that act, if made, accepted, or endorsed in the name of the company, by any person acting under the express or implied authority of the company. It appeared that three directors, subscribing their names as



such, jointly promised to pay for the corporation. In both of these cases it will appear that the promise was made on behalf of the respective companies mentioned in the body of the promissory notes, but in the case before us nothing whatever in the promise to pay is stated, indicating on whose behalf or for whom it is made; the defendants have added after their names respectively, president and secretary of the Grand Trunk Telegraph Company. In the case of *Lindus v. Melrose* no seal was attached to the promissory note. In the courts of the United States it is held that a note, signed by the authorised agents of a corporation, with words annexed to their names intimating their agency, is the note of the corporation, and not of the persons signing it. Alluding to this, in the case of *Mare v. Charles* (5 E. & B. 978), Lord Campbell says: "Thomas v. Bishop, it appears, has been doubted on the other side of the Atlantic; but for a century it has been uniformly considered good law in this country."

The last case which we had to consider upon the point is *Foster v. Geddes* (14 U. C. R. 239); and there I expressed my opinion that the secretary of the Wolfe Island Railway Company was not exonerated from personal liability because he had added to his name the designation of secretary, and had affixed the corporate seal, because it was mere matter of description who Geddes was. I guarded myself in that case, by stating that *perhaps* the effect of adding a seal might, if the acceptance had been on behalf of the company, *per procurationem*, have the effect of charging the company. On referring to the charter of that company, 14 & 15 Vic., ch. 149, it does not appear that the company had any power whatever to create a security in the shape of a bill of exchange, much less to issue, as it is said in the charter of the company before us, evidences of debt. It did not appear what right the drawer of the bill had to draw upon the Wolfe Island Company, or that in fact the bill was drawn on the company at all. It was drawn upon their treasurer, as appeared, but it did not follow that the treasurer had any authority to bind the company by affixing the corporate seal. If he had any such authority, then the next question would have been, whether it could have been made a nego-

tible instrument by the seal being affixed, or whether it should be treated as the single bill of the corporation. It could not have been treated as the single bill of the company for the drawer was directing his debtors (if the company were to be considered as the drawees and debtors to the drawer) to pay over the amount to another person, which would be a power of attorney to the payee to receive the amount, and if paid by the company would no doubt discharge them from the debt they owed the drawer. To make the seal operate as an acceptance in favour of the order of the payee (for the bill of exchange was drawn in that form) would, if the affixing of the seal could be held to have transferred the debt due by the company to the drawer over to the payee, be, as Baron Parke says, in *Hibblewhite, v. McMorine* (6 M. & W. 256) "an attempt to make a deed transferable and negotiable like a bill of exchange or exchequer bill, which the law does not permit."

Whether the addition of the words after the signatures of Whitney and Cheney, that they were the president and secretary of the company, would be sufficient to shew that the instruments were promises on behalf of the company, and not joint promises of their own, under the words of the eighth section of the act before us, is a different question from that of what effect should be given to them in consequence of having the corporate seal. It is established to be the seal of the corporation, and as the corporation was authorised to issue evidences of debt, I do not see why it might not do so in the ordinary way, under the corporation seal, to such persons as the company may have contracted debts with. The seal being the seal of the association, and supposing there had been no signature, and nothing but the corporate seal, I think the corporation would be bound by these instruments. Whether the instruments could be made negotiable is quite another question. In *Glyn v. Baker* (13 East, 509) a question was raised, whether East India bonds, which were always made payable to their treasurer and endorsed by him, were negotiable by delivery, Lord Ellenborough said, supposing that it had been proved that it was the custom to transfer such securities by delivery, "how could

a right of action upon these securities be made to pass by such a practice to the holder of them, where by law no such right passes? there must always be that impediment existing to the legal negotiability of such instruments; which distinguishes them from bills of exchange, and securities of that nature, in which the legal interest passes, under the law merchant, by endorsement and delivery to another." In *Gorgier v. Mellville* (3 B. & C. 45), which was an action of trover for a Prussian bond, Lord Denman uses language somewhat at variance with what is stated by the judges in the case in *East*, though he distinguishes the two by saying that in *Gorgier v. Mellville* it appeared by the evidence that Prussian bonds were sold in the market, and passed from hand to hand like exchequer bills. The case of *Enthoven v. Hoyle* (13 C. B. 373) was this: The action was brought on seven instruments declared upon as promissory notes, made by the governor and company of copper miners in England, under their common seal, payable to the defendant or order, and by him endorsed to the plaintiff, who had advanced the money upon them to the defendant. The declaration contained also the money counts. It was proved at the trial that these instruments were issued in blank, and when used by the defendant he inserted his own name as the payee, and made them payable to his order. Exceptions were taken at the trial, and the case went before the Court of Exchequer Chamber, and Baron Parke, in delivering the judgment of the court, says (page 394), "We are all of opinion that these bonds or debentures were properly admitted in evidence for one purpose; that is, for the purpose of shewing that they really were worthless as such; and, therefore, to lay a foundation for the plaintiff's right to recover upon the money counts. If they had been used in order to support, and the learned judge had said there were evidence in support of, the special counts, that would have been wrong, because they were on improper stamps; and, in the next place, the debentures or deeds were void, because, if the jury believed the statement of Mr. Cunliffe, when they were presented to him, and the money was advanced, there was a blank for the name of the payee, that blank being afterwards filled up

by the defendant with the words, "Enthoven or order." If the debentures in that case could be treated as promissory notes, then blanks might have been left for the name of the payee, but it was treating them as deeds which caused them to be held void. In some of the American courts it is held that the effect of sealing a promissory note is to render it a specialty; that is, that it is a single bill in fact; and they say there is no difference in this respect between the act of a corporation and an individual.—See *Clark v. The Farmer's Manufacturing Company* (15 Wend. Rep. 256). I do not myself see that there should be any difference in the effect of sealing between a corporation and an individual, unless this, that it is by the seal the corporation speaks, and that it may be said the corporation may obligate itself by promissory notes as well as by specialty, through the instrument by which it is made to speak.

Suppose these instruments had been drawn up in this way, "I promise to pay, &c.," and had been signed by one person, and he had added a seal to his name, there could be no question that it would be the obligation of the person in some way, either as a promissory note, or a single bill, as it is called; and if it were held to be *simplex obligatio*—that is, that it was a deed—the effect then would be that it was not negotiable. Then it may be asked, what difference should there be when the instruments are drawn up, "We promise to pay, &c.," and the corporation seal is affixed. Is it or not the obligation of the corporation? The argument which may be used by the holder of the instrument may be this: the parties who put their names may use any seal, and may seal with the corporation seal as well as any other, and any number of persons may use the same seal. That argument however, would be destructive to the plaintiff's case, because although it might be held a sound argument to charge the defendants individually, it would prove too much for the present case, for it would shew the instruments to be deeds, and consequently not transferable by the payee, in the manner that promissory notes or bills of exchange may be transferred, so as to give a right to sue in the name of the holder. Whenever the question should arise as between the



payee of the instruments, and the parties who put their names with a seal to them, as to who was bound thereby, the question would then be one of intention, to be gathered from the instruments and from the facts. The case of *Edmunds v. Brown et al.* (1 Lev. 237) was this: the plaintiff endeavoured to make the defendants, who were two of the principal of the Company of Wood-mongers, individually liable upon a bond sealed with the company's seal, and to which the defendants' names were set in the usual manner. The company, it appears, had been dissolved, and the plaintiff thought he could charge the defendants individually, because they had signed their names, though the obligation was *Noverint universi per præsentis nos Magistrum et Guardianos, &c.* The plaintiff was nonsuited. The expression "*We promise to pay*" will apply to the association; and when the instruments have the corporate seal, and the president and secretary sign also as such, the reasonable and fair presumption is, that they do so in order to authenticate the seal as being that of the association, and that it is the company that is meant by the expression *we*, and not the parties themselves individually, as separate and distinct from the other members of the company.

The eighth section of the act enacts, that all evidences of debt issued by such association shall be issued and signed by the president and treasurer thereof. Whether it would be sufficient to bind the company for the president and secretary to sign as such, without using the corporate seal, we need not determine. Perhaps it would be so held, and that the effect of the clause was in case of the association, to enable the body to contract more easily than by using the seal as well as signing, for the company could contract by and under its seal without that provision in the eighth section. If the contract were made without the seal, then it might be made a question whether the contract in the present case sufficiently complied with the statute, because, in place of the treasurer signing, the secretary had signed with the president. Here, however, the contract is under the seal of the corporation, and I do not understand that the intention of the legis-

lature was, that, in addition to the seal of the corporation, authenticated as it is in this case, there should also be attached the signature of the treasurer of the company; for then in such case, instead of the legislature rendering it more easy for the corporation to contract, it would have the effect of making it more difficult to do so.

To sustain the proposition of the plaintiffs, namely that these instruments should be treated as the promissory notes of Cheney and Whitney, transferable by endorsement, we must reject the circumstance of a seal being affixed to them *in toto*. I do not think we can do that. In Sheppard's Touchstone, 55, it is said, "And a deed is good, albeit these words in the close thereof, *in cujus rei testimonium sigillum meum apposui*, be omitted; and albeit there be no mention made in the same deed that the deed was sealed and delivered; so as in truth it be duly sealed and delivered, and the sealing and delivery can be proved."

The sealing of the instruments, in my opinion, cannot be overlooked or disregarded; and therefore the case seems to me reduced to these two considerations:

1. If the instruments are to be considered as the individual obligations of the parties who have attached their names thereto, and the seal affixed is to be considered as their seal, then the effect of that act is to make these instruments deeds; and as such, though they be made payable to order, yet the custom of merchants, applicable to promissory notes and bills of exchange, cannot make these instruments transferable.—See *Hibblewhite v. McMorine* (6 M. & W. 200).

2. If the sealing is to be considered the act of the association, and that the body corporate is thereby bound, then the action as against Cheney and Whitney must fail, for they have made no such notes as declared upon and as against the endorser it must fail, for he did not endorse any such notes. As to the latter point, it is not material to consider whether this association could or could not make a security under the corporate seal transferable in the nature of promissory notes, or whether these instruments are to be treated as single bills. That question might arise as against the defendant Boomer, upon a count framed to meet it, and

then the case referred to, of Enthoven v. Hoyle, will be found an important one.

In either point of view the plaintiff's case fails, and in one or other of those two the case must be presented. The latter most likely is the true one; for the internal evidence of the parties having signed their names as they have done, with the external evidence that it is the corporate seal which is attached, combine to show that it was the association which was contracting, and not the defendants individually.

MCLEAN, J., concurred.

Rule absolute (a).

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### THE MUNICIPALITY OF THE TOWNSHIP OF KINLOSS V. STAUFFER.

*Municipal corporations—Right to sue on contract not within their charter—  
New trial refused.*

Defendant gave his bond to a municipality to put up a mill on his own land, and being sued upon it pleaded performance, which at the trial he failed to prove, and a verdict was rendered against him for £12 10s. The court, under the circumstances, refused to interfere.

*Seem*, however, that if the objection had been taken in time, no action could be maintained by the municipality on such a bond, without shewing on the record something to warrant them in taking it, the contract being apparently one wholly without the scope of their charter.

PLAINTIFFS declared in debt, setting forth that defendant on the 17th of July, 1855, by his bond acknowledged himself to be bound to the plaintiffs, under the name of the Municipal Council of the Township of Kinloss, in £150, to be paid on or before the 1st of January then next, yet that defendant, though often since requested, had not paid it.

The defendant set out the condition as follows: "The condition of the above obligation is such, that if I, the above bounden Eli Stauffer, shall build or cause to be built a good and sufficient saw-mill on lot 58 in the first concession of the aforesaid township, on or before the first day of January now next ensuing, then the above obligations to be null and void, otherwise to remain in full force," &c.

The defendant pleaded performance.

The plaintiffs replied, denying the truth of that plea, and

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(a) See the Law Times for August 29th, 1857, page 289, in which *Lindus v. Melrose* and other cases upon the same subject are referred to and commented upon.

assigning as a breach of the condition that defendant did not build, or cause to be built, a good and sufficient saw-mill on lot 58, &c., on or before the 1st of January, &c., or at any time before or afterwards, but that he wholly neglected and refused to do so.

The defendant rejoined, reiterating his plea of performance; but he failed to prove it, and the jury gave a verdict for the plaintiffs for £12 10s. damages.

On the trial at Goderich, before *Richards, J.*, the reeve of the township was sworn. He stated that the saw-mill was completed about the end of June, six months after the time limited, but was not an efficient mill. The township, he said, contained at that time about 600 or 700 inhabitants, and probably 1000 at the time of the trial. There was another saw-mill, he said, in the township, about ten miles from the one in question.

It was objected that the municipal corporation had nothing to do with building saw-mills or getting them built: that they were acting out of the scope of their proper duty in taking such a bond, and therefore could claim no damages for the breach of the condition.

The learned judge held that the corporation might legally receive a bond from a party willing to do anything for them that was not illegal, and that might, though indirectly, tend to their benefit; but he told the jury he could give them no particular direction to govern them in awarding damages. The defendant gave no evidence in support of his plea of performance, and a verdict was rendered for the plaintiffs, and £12 10s. damages.

*Christopher Robinson* obtained a rule *nisi* for a new trial, on the law and evidence, and the judge's charge, no damages having been shewn or proved to have been sustained by the plaintiffs; and also because no action could be maintained by them on the bond sued upon, the same having been taken in a matter not within their jurisdiction or authority. He cited *Hamblin v. Great Northern Railway Company*, 2 Jur. N. S. 1122; *Colman v. Eastern Counties R. W. Co.* 10 Beav. 1; *Angell and Ames on Corporations*, 4th Ed., secs. 256, 260; *Philadelphia Loan Co. v. Towner*, 13 Conn. Rep. 249.



*S. Richards* shewed cause, citing *Grant on Corp.* 98; *Angell and Ames on Corp.*, sec. 234.

ROBINSON, C. J., delivered the judgment of the court.

The township councils have authority given them by statute 12 Vic., ch. 81, section 2, "to make and enter into such contracts as may be necessary for the exercise of their corporate functions."

Among the objects to which they may apply their corporate powers, there are some relating to plank roads, bridges, public buildings and sale of timber growing upon public allowances for roads, which we may conceive it possible might be much promoted by their procuring a saw-mill to be built in certain situations, where without some encouragement or assistance it would not be built in time to answer their purpose.

Whether the possibility of their having a legitimate motive for entering into a contract, which without explanation was wholly out of the scope of their charter, would be sufficient to warrant a court in sustaining an action upon such a contract at their instance, in the absence of any explanation, would have been the question, if the defendant by demurring to the declaration or otherwise, had raised an objection to their competency to sue upon such a cause of action, instead of pleading that he had performed what he had undertaken. But having rested upon that plea as his only defence, and gone to trial upon that single issue, the learned judge at the trial could not properly do anything else than try with the aid of the jury, the truth of that plea. Then having failed to prove performance, the question of damages inevitably came up. Nominal damages at least must be given in any case of breach of contract, and certainly there was nothing said to the jury that could encourage them to give substantial damage. They gave £12 10s. We could not relieve from the verdict without making the defendant pay costs, for if the contract was illegal, and he meant to repudiate it, he should not have put the plaintiffs to the trouble and expense of meeting him upon a plea of performance.

It would not be worth while to relieve the defendant

on such terms, and he has no particular claim upon the court to deviate from its rules in his favour, for he shews us nothing of the real facts of the case. He had, we may assume, some good inducement for entering into the engagement which he did, and there was nothing unusual in it, or illegal, in any other sense than that it may have been out of the scope of the plaintiffs' charter of incorporation to engage in such a transaction. If that question had been raised in time, and in a proper manner, my present impression is, though the point admits of doubt, that it might have been held necessary for the plaintiffs to shew on the record such circumstances as would warrant them in contracting with a man to build a saw-mill, and especially on his own land. When a corporation is of that nature that it may have occasion to give promissory notes, and draw and accept bills in the prosecution of their proper business, it will, I think, be assumed that any note or bill upon which they are sued, or are suing, was given or taken for a purpose within their charter, until the contrary is made to appear; but I do not think that the principle could be reasonably extended to a transaction so apparently beside their proper business as this would seem to be; and undoubtedly it should be the endeavour of courts of justice to restrain such corporations, and persons dealing with them, to transactions such as the charter contemplates, for otherwise the corporate privileges, and the immunities given to them for other purposes, might be unfairly extended and abused, to the prejudice of those who have no such privileges granted to them; and the public funds and interests, which they are entrusted to manage, might be sacrificed and ruined by their embarking in business which the legislature never contemplated.

Still we could not, for the reason which we have stated, give the defendant the benefit of the exception upon this rule, without departing from the well understood practice of the courts. It is for the defendant to consider whether it is not still open to him, under another mode of proceeding, if he thinks it worth while to persevere in opposing what may under the circumstances be a perfectly just claim.

Rule discharged.

## SHEERAN V. O'CONNOR ET AL.

*Pleading—Demurrer—Denial of sum distrained for.*

Replevin - Avowry for distress for rent under a demise for years at £18 a year, averring £18 to have been due. *Plea*, that defendant did not take the goods as and for a distress for the sum of £18.

*Held*, on demurrer, plea good in substance.

REPLEVIN.—Defendants, O'Connor as landlord, and Bradley as bailiff, avowed the taking as a distress for rent due on a demise for years, at a rent of £18 a year, averring £18 to have been due for one year's rent.

The plaintiff pleaded, as a second plea to that avowry, that the defendants did not take the goods in the declaration mentioned, as and for a distress for the sum of £18, under the said demise in the avowry mentioned.

The defendant demurred to this plea, as being bad in substance.

*S. Richards*, for the demurrer, cited *Leyland v. Tancred*, 16 Q. B. 664; *Glyn v. Thomas*, 11 Ex. 870.

*McMichael* contra.

ROBINSON, C. J., delivered the judgment of the court.

The question is, whether the answer to the avowry seeks to raise an immaterial issue. This is no denial of the demise as stated, nor is it a denial that so much rent was due as was claimed, which would clearly be no bar, because the amount due is not material, if the landlord had at the time a right to distrain for any thing. It is a denial that the defendants distrained for the exact sum which they alleged they distrained for: the plea does not say whether they distrained for more or less. The objection taken to the plea is that it brings in issue the exact sum for which the warrant issued, which is of no moment so long as any thing was due.

If the sheriff should justify under a *fi. fa.*, and set out the writ wrong as regarded the sum to be made, it would be a parallel case. Upon a traverse of the writ set out the variance would be material, but if the sheriff should mistake the sum which he was directed to levy by indorsement, it would hardly, we think be material in an action of trespass. The writ itself is a matter of record, and must be set out truly.

But however that may be, all that can be said, we think, of the plaintiff's answer to the avowry, is that it answers the matter of the plea with needless particularity, in denying that the defendants distrained for the precise sum of £13. It might fairly have been taken as an objection on special demurrer that the plea amounted to a negative pregnant, for that it might be taken as intended to admit that the defendants distrained under a demise made for such a term, and at such a rent as was stated in the avowry, and to admit also that £18 for a year's rent was due, as stated, but to deny that the defendants distrained for that sum. Now, it is quite immaterial in this action of replevin whether they distrained for more or less than was due. If for less, that would be no wrong; if for more, that would only furnish ground for an action on the case for an excessive distress; but there would be no illegal taking, and no pretence for an action of trespass.

If the defendants, instead of demurring to the plaintiff's plea, had taken issue upon it, they would have been entitled to succeed if they had proved the substance of the issue: that is the demise, and rent due under it, and a distress for the rent. The exact sum distrained for would not have been material, and therefore the avowry could not be barred by disproving the allegation merely as regards the sum.

That being so, we must hold that the amount is not put in issue by the plaintiff's replication, and therefore that is not in substance a bad replication.

Judgment for plaintiff on demurrer.

## HALL ET AL. V. BROWN.

### *Covenant—Construction of—Payment of interest.*

Covenant in a mortgage to pay £292 in eight equal annual instalments of £36 10s. each, "with interest on the principal sum remaining *due* at each payment."

*Held*, that interest must be paid with each instalment on the whole principal money unpaid, though it might not be then payable,—not on the instalment only.

APPEAL from the county court of the County of Essex.

C. S. Patterson for the appellant.



The question to be decided is sufficiently stated in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

We think the learned judge of the county court took an erroneous view of the construction of the covenant sued upon, and that the judgment of the court below, directing the amount of the verdict to be reduced, must be reversed, and the plaintiffs have judgment for the amount found by the jury, with interest.

The only plea on the record was *non est factum*, and as it has not been questioned that the plaintiff was entitled to recover upon that issue, we assume that the covenant is correctly set out.

The undertaking then was to pay £292 in eight equal annual instalments of £36 10s. each, "*with interest on the principal sum remaining due at each payment, on the 1st day of October in every year thereafter, until the principal sum and interest shall be fully paid and satisfied.*" That has been construed in the court below to mean, that the covenantor is to pay interest only upon each instalment as it falls due, leaving the interest upon all such portion of the principal as shall not at that time be payable to be paid in proportions with the principal, as the instalments successively become due.

We think, however, that the true construction of the covenant is, that whenever as the instalment falls due, that instalment and interest is to be paid, and with it all arrears of interest on such portion of principal as is still due, though not yet payable.

That a sum may be *debitum in præsentī* though *solvendum in futuro* is very clear, and it was in this sense that the word "due" was used in the instrument. If the parties had meant otherwise they would have said only that the instalment of £36 10s. should be paid on the 1st of October in each year, with interest *thereon*, and not have expressed, as they have, that with each instalment there shall be paid "*interest on the principal sum remaining due at each payment.*" In the sense which the defendant contends for there

would be nothing *remaining* due at each payment, for the payment would cancel the particular instalment that was paid.

The allusion is evidently to the whole principal remaining due, or there would be no use for the word "remaining." The language is not quite accurate, for it should have expressed that the instalment was to be paid with interest, and also interest on the sum remaining due; but the intention is plain. We must construe the agreements of parties according to the ordinary acceptation of the words they use, and we know very well that when a man is asked how much is due on his land, he understands well what is meant by the question: namely, how much of the purchase money he yet owes, which is only a circumlocution for the word "due." In a strict sense, and for certain purposes, *due* is confined to what is payable, as when we speak of a bill or note being due; but that is not its general sense, and certainly not its only sense.

If A. should make an assignment of all debts due to him, he would find that it would extend to other demands than those which were payable at the time.

The judgment below must be reversed, and the rule set aside for reducing the verdict, which is to stand as given upon the trial.

Judgment below reversed.

#### OLMSTEAD ET AL. V. SMITH ET AL.

*Assignment of chattel in trust for creditors—Defect in affidavit—13 & 14 Vic., ch. 62—Change of possession as to part—Effect of.*

An affidavit accompanying an assignment for registration stated that the deed was not made for the purpose of enabling the *assignor* (instead of the *assignee*, as required by the statute) to hold the goods against creditors. *Held*, bad.

*Quære*, per *Robinson, C. J.*, whether, when as to part of the goods assigned there has been no change of possession, the assignment unless filed is not void altogether, although the possession of other goods included in it has been changed.

*Semble*, per *McLean, J.*, that assignee of goods, in trust to sell and divide the proceeds among creditors, cannot properly take the affidavit required by 13 & 14 Vic., ch. 62.

INTERPLEADER issue.—At the trial, before *Burns, J.*, at the last assizes held at Woodstock, the facts of the case

appeared as follows: the plaintiffs claimed to hold the property in dispute by virtue of a deed of assignment, executed by one George W. Towar to them, dated 6th of September, 1856, made in trust for the creditors of the said Towar. The defendants were execution creditors of the said Towar, their execution being placed in the hands of the sheriff on the 2nd of December, 1856, under which the property in question was seized. The deed was filed on the 7th of September in the office of the clerk of the county court, with an affidavit, made by all three plaintiffs, the trustees, which affidavit, after stating the consideration for making and executing the deed of assignment to them, went on to state that it was not made for the purpose of holding or enabling *the said George W. Towar* to hold the goods or property in the said indenture mentioned against the creditors of the said George W. Towar. Instead of selling off the goods and property of the estate, and paying the debts as far as the proceeds would go, the trustees deemed it best to carry on the business. The property consisted of large quantities of timber, and saw-logs to be manufactured into timber, and the materials necessary and required to carry on such business, and also of the household furniture in the house in which the debtor Towar resided. Towar was allowed to live in the house, and use the furniture as he always had done, and all the other property remained with him in his possession after the transfer just as it had done previously. It was stated by Towar that when he made bargains for sales of any of the materials he consulted with one of the plaintiffs as to them. It was stated that the plaintiffs had advanced means of their own in order to carry on the business for the benefit of the estate, and that all the money received for sales of timber or logs passed through their hands, and that Towar had nothing whatever to do with the financial affairs of the business, but was employed by the assignees as an agent to manage the business, and the trustees supported him and his family. The witness, who kept the books and accounts for the trustees, stated that he thought there would be on winding up the estate, some \$7000 or \$8000 surplus.

There was one yoke of oxen which had been purchased by the assignees themselves from their own means, and which was seized by the sheriff, and with respect to which it was not denied the plaintiffs were entitled to a verdict. With respect to all the other property, it was contended by the defendants that the deed of assignment was void, for that by the statute 13 & 14 Vic., ch. 62, it was required that the affidavit to be annexed to the conveyance, where the possession was not changed, should state that the sale was not made for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against the creditors of the bargainer. Leave was reserved to the defendants to move the court to enter a verdict for them on this point.

The question then left for the jury was, whether there ever had been any change of possession of the goods, such as the legislature must have contemplated where it was not intended to rely upon the deed being filed to sustain the sale and transfer. The learned judge told the jury, that with respect to the household furniture, and buggy and waggon, he did not think the evidence proved a sufficient compliance with what was intended; and as respected the saw-logs, that as the whole was one transaction there seemed no reason to draw any distinction between that portion of the property and the part; and that he was of opinion the plaintiffs' case failed to shew that such change of possession had taken place as must be supposed to have been what the legislature intended.

The jury, however, found a verdict for the plaintiffs for the whole of the property.

*Becher*, Q. C., during last term obtained a rule to shew cause why a verdict should not be entered for the defendants on the leave reserved, or why there should not be a new trial. *Eccles*, Q. C., shewed cause.

ROBINSON, C. J.—We cannot direct a verdict to be entered for the defendants, which is an alternative of the rule, because a yoke of oxen, which the sheriff seized under the execution against Towar, never had been Towar's property, but had, according to the evidence, been purchased from a third party



by the plaintiffs with their own money, with a view of carrying on the lumber business for the benefit of Towar's estate. In respect to these oxen, therefore, the jury could not properly have done otherwise than find for the plaintiffs.

As to all the other property, the question at the trial was, whether the plaintiffs had a legal claim to hold it under the assignment made to them by Towar. Certainly their evidence did not shew that the possession of the household furniture, and of the horse and buggy included in the assignment, had been changed in consequence of such assignment; on the contrary, Towar continued to use and enjoy those articles as before.

Admitting that under the evidence given other portions of the personal property assigned might be considered as having actually gone out of the possession of Towar, and into the possession of the plaintiffs, which was a question for the jury, and in some measure perhaps a question of law under the peculiar circumstances of the case, then the question would present itself, whether, if possession of part of the goods assigned had been changed, while the possession of the remainder had been allowed to continue in the debtor as before, the assignment, supposing it to be unregistered, would be thereby wholly void, or only void as it respected those goods which had remained in the debtor's possession. (a)

However that may be, there is at least no doubt that as to those things of which the possession is not changed, the assignment will be void, unless the other provisions of the statute were complied with.

It was therefore necessary here to shew that the assignment made was duly filed in order to give it effect in regard to the household furniture, and any other things of which the possession had been allowed to continue in the assignor; and we think the statute in this case was not complied with, for the affidavit which is required by the statute, instead of stating, as it ought to have done, that the assignment was not made for the purpose of holding, or enabling the bargainee to hold the goods against the creditors of the bar-

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(a) See *Taylor v. Whittemore et al.* 10 U. C. R. 440; *Short v. Ruttan* 12 U. C. R. 79.

gainer, states that it was not made for the purpose of holding or enabling the said George W. Towar to hold the goods, &c., against the creditors of the said George W. Towar. Now Towar was the bargainer and not the bargainee, so that the affidavit required is in substance departed from; and the statute expressly enacts that an affidavit such as it requires shall accompany the conveyance, otherwise the conveyance shall be absolutely void as against creditors.

It is true that in many cases mere clerical errors in conveyances and other writings, are cured by the court reading the instrument according to what must have been intended, but we cannot hold this to be a palpable clerical error. The person who drew the affidavit either did not look at the statute, or misconstrued its intention, and took upon himself to vary the expression in a very material part. If we were to accept this affidavit as sufficient, we might be suffering the statute to be intentionally evaded; and, besides, the statute is express, and it has not been complied with. There must therefore be a new trial without costs, for as regarded some of the goods assigned, if not all, it was necessary to the validity of the assignment that it should have been duly registered, which it was not, for want of such an affidavit as the act imperatively requires.

McLEAN, J.—The assignment in this case being absolute in its terms, for particular purposes, the statute 13 & 14 Vic., ch. 62, required an affidavit to accompany the conveyance, to be made by the bargainee of the goods, that the sale was *bona fide*, and for a good consideration (setting it forth), and not for the purpose of holding, or enabling the bargainee to hold the goods mentioned therein against the creditors of the bargainer, otherwise the sale or assignment is declared absolutely void as against creditors of the *mortgagor*, and as against subsequent purchasers and mortgagees in good faith. The affidavit which the plaintiffs, as assignees of Towar, have made, is that the sale and conveyance to them of the lands, property, goods and chattels in the indenture mentioned, and thereby made, are *bona fide* and for good consideration, (setting forth the trusts to be carried out, and the

consideration of 5s. by them to the said George W. Towar in hand paid) *and not for the purpose of holding, or enabling the said George W. Towar to hold, the goods or property in the said indenture mentioned against the creditors of the said George W. Towar.* This affidavit is at variance with what the statute requires, which is that the sale was not made to enable the plaintiffs, the *bargainees*, to hold the goods against the creditors of the bargainor (Towar), whereas they swear that the sale was not made for the purpose of holding or enabling *Towar himself* to hold the goods, &c., against his creditors. This discrepancy may probably not be unintentional, and I do not see how the affidavit required by the statute can be taken by assignees in the position of the plaintiffs, who take a conveyance of goods in trust for the benefit of creditors, the very object of the conveyance being to hold them against all creditors, though with a view of distributing the *proceeds* ultimately amongst them, or such as may choose to become parties to an assignment. It can scarcely be said that the plaintiffs were not to hold the goods of Towar against his creditors, because they were authorised to sell them and make specific payments. The creditors could not touch the goods, if the assignment is legal, as this case distinctly shows. The plaintiffs now are holding Towar's goods against the defendants, his creditors, and how could they swear that they did not receive them for that express purpose? (a) This may account for the name of Towar being introduced in the affidavit instead of the names of the plaintiffs, the *bargainees*, as required by the statute. The affidavit then being palpably defective, the instrument by which the sale is made is under the statute absolutely void as against creditors of Towar, and the verdict should be in favour of the defendants, for all the property, except a pair of oxen proved to have been purchased by the plaintiffs, unless indeed the sale was accompanied by an *immediate delivery*, and *followed by an actual and continued* change of possession of the property sold.

That there was not such an actual and continued change of possession in this case is manifest from the facts stated

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(a) See, on this point, *Heward v. Mitchell et al.*, 11 U. C. R. 625.

by Towar himself. He swore that the furniture in his house was assigned with the rest of the goods: that it was understood that he was to continue in possession and have the use of it, and that he so continued; that he superintended the business as usual during the winter: that he received what money he wanted; that he sold property to satisfy a debt due to one Smith without consulting the plaintiffs: that he used the buggy and his men used the waggon contained in the conveyance when they thought proper; and besides this, the deputy sheriff states that when he went to seize the goods the plaintiffs were following their own business as merchants at Tilsonburg, and the defendant was in possession and managing the property assigned. It is clear, I think, that there was no visible or actual change of possession, though the plaintiffs may, on the faith of the assignment to them, have advanced money to Towar in carrying on the affairs in his charge. If such actual and continued change of possession had taken place, there could have been no necessity to enter the sale in the office of the clerk of the county court; and the fact of its having been so entered, though irregularly, affords presumptive proof that such a change of possession had not taken place.

The plaintiffs cannot maintain their claim under the assignment from the defect in the affidavit accompanying it; but as they appear to be entitled to succeed as to a small portion of the property seized, a yoke of oxen, and the defendants for the residue, I concur in the propriety of granting a new trial, when such further evidence may be given on either side as the parties may have it in their power to adduce.

BURNS, J., concurred.

Rule absolute.

# STEWART V. THE WOODSTOCK AND HURON PLANK AND GRAVEL ROAD COMPANY.

*Road companies—Impediments caused by snow-storms—Action for by lessee of toll-gate—16 Vic., ch. 190, secs. 48, 69.*

Road companies under 16 Vic., ch. 190, are not liable to the lessee of a toll-gate for allowing the road to become blocked up by snow.

APPEAL from the County Court of the County of Oxford.  
The declaration alleged that defendants leased to the



plaintiff a toll-gate on their road, for a certain rent, to be paid by the plaintiff to defendants, in consideration that the plaintiff should keep said gate and receive the tolls paid there for his own use; that it then became and was the defendants' duty to keep the road in reasonably good condition, unincumbered, and fit for use; and although the plaintiff kept said gate for ten months, and became entitled to receive a large sum of money, to wit, £50, out of the tolls received there, yet defendants, contrary to their said duty, allowed the road near said gate to be incumbered and blocked up with snow, so that it became impassable, and thereby the plaintiff lost the profits from said tolls for two months.

Defendants pleaded "not guilty," by statute 16 Vic., ch. 190, sec. 53.

The lease contained no provision as to keeping the road in repair.

At the trial it was objected that the action was not maintainable, but the case went on, and a verdict was rendered for the plaintiff, and £50 damages. A rule *nisi* having been obtained to enter a nonsuit, it was after argument discharged, and from this decision the defendants appealed

*Galt* for the appeal, *D. G. Miller* contra.

16 Vic., ch. 190, secs. 6, 7, 11, 20, 21, 22, 28, 29, 31, 34, 48, 49; *Phelps v. Grand River Navigation Company*, 12 U. C. R. 245; *Blyth v. Birmingham Water Works Co.*, 11 Ex. 781; *Couch v. Steel*, 3 E. & B. 402, were cited.

ROBINSON, C. J., delivered the judgment of the court.

In the argument this action was said to be grounded on our statute 16 Vic., ch. 190, secs. 48 & 49, though there is nothing in the declaration referring to any statute. It was a mistake, we think, to hold that anything in the 48th section refers to acts done or things omitted by the company. The clause contains prohibitions against acts injurious to the road done intentionally, or things suffered negligently to occur, by persons unconnected with the company, and of which the company would be the party chiefly entitled to complain.

The 49th section is directed against certain acts of which

the company might be guilty, but nothing can be clearer than that the clause relates wholly to materials used by any company in making or repairing their road, and not to a fall of snow coming from the clouds.

Then as to the action lying on any ground independent of this statute, there was no authority cited for it, and we are not aware of any clear ground on which it could be rested. The defendants, in leasing the tolls on their road, cannot be held to have undertaken to insure against snow-storms. The person who leased the road, whether by bidding at a public auction or otherwise, must be supposed to know that we have snow-storms in winter, as well as other impediments at other times, which make travelling inconvenient, and keep people in a great measure from using the road for a time; and they may be supposed fairly, we think, to make their engagement under a sense that it will be prudent to make allowance for those casualties. Letting snow lie on a macadamized road does not, in our opinion, come under the notion of suffering the road to go out of repair.

If the lessors in this case should be held bound to remove the snow for the sake of their tenant, how many miles must they keep clear? All the line of road by which travellers are in the habit of approaching the gate? or if not, what portion of it, and by what principle should we limit the number of miles in any direction, that they are bound to keep clear.

We know of no ground for a distinction between the case of this lessee of tolls, and the lessee of a mill, where nothing has been stipulated in the lease about repairing the dam in case of accidents; and we think we can no more in this case than in that supply what the parties have omitted to provide for in their written contract; indeed it was hardly attempted to support the action, otherwise than under the statute.

We think the rule for nonsuit should have been made absolute, if leave was reserved at the trial to move, as we ought to infer from the rule *nisi* being granted in its present shape, for the learned judge must have known whether he had reserved leave or not.

The defendants' counsel stated in the argument before

us that such leave was not reserved, but it is the same thing so far as the parties are concerned, for there would be no use bringing another action.

Judgment below reversed.

### HARPER V. LOWNDES.

*Ejectment—Writ served on defendant not in possession—Practice.*

Plaintiff commenced an action of ejectment against the defendant, after he had quitted possession of the premises in question. Defendant entered an appearance, not limiting his defence, nor stating the nature of his own claim, but at the same time he served a notice on the plaintiff's attorney that he did not deny the plaintiff's title, and had given up possession before action brought. The plaintiff nevertheless took the record down to trial.

*Held*—1. That the notice given with the appearance did not oblige the plaintiff to prove at the trial that the defendant was in possession when the writ issued.

2. That upon such notice the plaintiff could not have signed judgment.

3. That the bringing an action under the circumstances was unnecessary, but that the defendant should have applied to the court to set aside the writ, instead of appearing to it: and both parties being wrong, the proceedings were set aside without costs.

*Quere*, per *Robinson*, C. J., whether, if defendant appears, but omits to give notice of the nature of his title, the plaintiff may sign judgment as for want of an appearance.

EJECTMENT, for part of lot No. 6, in the first concession of Essa.

An appearance was entered by the defendant to defend for all the land claimed, on the 31st March, 1857, and at the same time a notice was served on the plaintiff's attorney "that the defendant does not deny, and never did deny, the title of the plaintiff, nor that the tenancy under the plaintiff had expired before the commencement of the suit, and that the defendant had given up possession of the premises previous to, and was not in possession at the time the action was brought, or at any time since."

The plaintiff made up the issue, and gave notice of trial, and brought down the record to the last assizes at Barrie, to be tried before *Burns*, J.

When the cause was called on the defendant objected, that there was nothing to try: that by his notice given to the plaintiff he had abandoned all claim or right to the possession of the premises; and that the plaintiff should and might

have taken a judgment as by default upon such a notice. The plaintiff contended, that in consequence of the defendant having entered an appearance, which operated as a plea to the declaration denying the plaintiff's title, he was not at liberty to enter a judgment and sue out a writ of possession upon the defendant's notice merely ; that a plea so entered must be disposed of in some way, and there was no other way to do it than by bringing it down to a jury to be tried ; and besides, he stated that he claimed occupation rent as against an over-holding tenant. The defendant answered that he had taken the course he did in order to save himself from costs, for if he contested the plaintiff's title he must fail : if he disclaimed title himself, or if he gave a confession of judgment, he would have to pay costs ; and he contended that he had left the premises at the expiration of his tenancy.

The difficulty between the parties arose from their different views of the construction of the ejectment clause of the Common Law Procedure Act, 1856, and what was the proper course for the defendant to have taken. The defendant had been served with the writ personally, and the case was not treated as one of vacant possession ; and the defendant contended that he must do as he had done, in order to save himself from the costs.

The learned judge, with a view of having the practice settled in such cases, caused a jury to be impanelled, and the evidence to be given on both sides, with respect to the possession being given up by the defendant. It appeared that the defendant had taken the premises for a year, and the dispute between them was whether the year expired on the 1st of February or the 1st of March, 1857. The defendant had occupied until the 28th of February, when he gave up the premises ; and the writ of ejectment was sued out on the 2nd of March. It was clear that the defendant was not in possession at the time the writ was sued out or served, and the weight of evidence seemed to shew that the year expired on the last day of February. The learned judge told the jury that there was no ground for any claim for occupation rent.



The verdict was entered for the plaintiff, with leave to the defendant to move to enter a verdict for him, if the effect of the notice given by him was to limit the plea to tendering an issue whether the defendant was in possession of the premises at the time of suing out the writ of ejectment; or that the defendant might, upon the evidence taken, move the court to stay all proceedings, with costs, or otherwise.

*McMichael* obtained a rule *nisi*, to shew cause why the verdict for the plaintiff should not be set aside, and a verdict entered for the defendant on the leave reserved, or a new trial ordered on the law and evidence, the only issue (as the defendant alleges) at the trial being whether the defendant was in possession at the time of the action brought, which the jury found was not the case; or why the proceedings should not be set aside, with costs to be paid by the plaintiff, on the ground that the defendant was not in possession of the premises when the action was brought, or at the time of the trial, and did not claim title thereto; or why all proceedings subsequent to the service of the writ should not be set aside, with costs, on the ground aforesaid; and why the plaintiff should not be made to pay all costs of the proceedings in this cause, together with the costs of this application.

*M. C. Cameron* shewed cause. There is nothing in the Common Law Procedure Act which allows such a notice as given by defendant in this case, nor any practice to warrant it. Under the old practice the consent rule provided for such a case; and the question now is, what course should be taken under the present system. If the defendant is improperly served with a writ in ejectment, not being in possession, he may move to set the writ aside; or he may do nothing, and the plaintiff can then take judgment, which will not carry costs, for defendant is not subject to costs unless he appears. If that had been done here there would have been an end of the matter. Section 257 shews that defendant may, if he pleases, confess the plaintiff's right after appearance; but here the notice given is not one of confession, or in accordance with the act, so that the plaintiff could not sign judgment upon it. The whole difficulty has been caused by

defendant's entering an appearance: by doing so he raised an issue which the plaintiff was forced to try, and his only course was to carry down the record as he has done.

*McMichael*, contra. It is not clear that defendant by forbearing to appear would have relieved himself from costs. Under the old form of action it might have been necessary to shew defendant in possession.—*Goodright dem. Balch v. Rich*, 7 T. R. 327; *Fenn dem. Blanchard v. Wood*, 1 B. & P. 573; but that is not held in practice to be requisite now. The notice given here was sufficient to authorize the plaintiff to sign judgment, and that was his proper course. It disclaimed all right to any part of the premises, and there was therefore nothing left to try. By the 228th clause defendant may limit his defence to a part only of the premises: suppose an action brought for ten acres, and defence only for one, the plaintiff could surely take possession of the nine, and why could the plaintiff here not have taken possession of all when defendant disclaimed holding any part? All proceedings subsequent to the notice were unnecessary, and defendant is entitled to have them set aside.

ROBINSON, C. J.—Great changes have been made in the action of ejectment, but it is still provided by the 274th clause of the Common Law Procedure Act “that the several courts, and the judges thereof respectively, shall and may exercise over the proceedings in ejectment under that act the like jurisdiction as exercised in the old action of ejectment, so as to ensure a trial of the title, and of actual ouster when necessary, and for all other purposes for which such jurisdiction might have been exercised.”

What then is it right for the court to do in the present case? for assuredly, under the old form of proceeding, the court always held that it had such a control over the action as to prevent injustice being done to either party by the method of proceeding.

The plaintiff was the defendant's landlord, and claimed that the term, which was for a year, expired at the end of January. The defendant maintained that it did not expire till the end of February, and though the plaintiff demanded

possession according to his view the defendant took no notice of it, but on the last day of February he took the key to the plaintiff, told him that he had quitted the possession, as in fact he had done, and never afterwards resumed it; and he offered to pay to the plaintiff the rent due to him, but the plaintiff declined accepting the rent, or the possession, telling him that the matter was in the hands of his attorney. The plaintiff, it seems, while he was insisting on his right to the possession from the 1st of February, had instructed an attorney to recover possession for him; and though no action had been instituted during the dispute, either he or his attorney thought it necessary for some reason to bring an action after the dispute was at an end, and, instead of entering into possession, the plaintiff, on the 2nd of March, sued out a writ.

That certainly was irregular, because the 220th clause of the Common Law Procedure Act provides, that the action of ejectment shall be commenced by writ directed "to the person in possession by name," which was not and could not be done in this case, for the plaintiff directed his writ to the defendant, who he knew was not in possession, but had given up the possession, so far as he could, to the plaintiff himself.

If the defendant, when served with the writ, had moved to set it aside, I think he should have succeeded. Instead of moving against the writ—which it was unjust and unreasonable to take out under the circumstances, for there was no object in it—the defendant, when he entered his appearance, gave a written notice to the plaintiff that he did not deny his title, admitting further that his own tenancy had expired before the action, and stating what the plaintiff already well knew, that he had given up possession before the action was brought, and had never afterwards resumed it.

Such a notice shewed that there was no possession to be defended, which alone could render it necessary for the plaintiff to proceed in the action. Nevertheless, as the defendant could neither confess the action, nor disclaim title, nor allow the plaintiff to take judgment, without being liable to costs, and as he ought not under the peculiar circumstances of this case to be obliged to pay any costs, he

took, as he states, the only course by which it seemed to him he could escape such liability, by entering an appearance, which he did on the 21st of March; and he stated therein, as is usual, that he defended for the whole of the land mentioned in the writ. This was altogether inconsistent with the notice he filed; but still the plaintiff, if he could have taken judgment before, could not do so, I think, in the face of that appearance.

And this statement of defendant's, given on the 31st of March, that he defended for the whole premises, must be allowed, I think, to have annulled all effect of his previous verbal notice to the defendant that he had quitted possession. He was at liberty to retract his former offer of possession, if the plaintiff did not object; and the plaintiff cannot be assumed by us to have known for what particular purpose, and with what expectation as to its effect on the subsequent proceedings, the defendant had filed this appearance. He was authorized, I think, to treat it as the ordinary appearance, put in for enabling the defendant to make a full defence; except only this, which is to be considered, that the appearance was not accompanied, as the 224th section of the Common Law Procedure Act requires, with a notice that the defendant denied the plaintiff's title, and setting up title in himself, specifying the nature of such title. The 222nd and 224th clauses of our act are peculiar, there being no such provisions in the English Common Law Procedure Acts.

One question which these clauses give rise to in the present case, is whether the plaintiff, in consequence of there being no such notice filed with the appearance, could properly have signed judgment under the 231st clause as for want of appearance. That is a point not very clear, I think. The plaintiff might contend he had such right, because for want of a notice, stating the nature of his title, the defendant, according to the act, could not give evidence of any title, and so could set up no defence. But, on the other hand, the effect of that would only be to deprive the defendant of the power of shewing title in himself. It would still be necessary for the plaintiff to shew a good *prima facie* title in himself. The reason of the thing, however, is in favour, I think, of



the plaintiff being allowed to sign judgment as for want of appearance, either with or without the previous sanction of the court, when there has been no notice of defendant's title as the act requires.

If he had, however, the defendant would have had to pay costs, unless the court under the circumstances should relieve him, but then the costs of the trial would not have been incurred.

The plaintiff took no such course, but carried his record to trial, and the defendant relied, and now relies, for his protection, on the necessity, which he contends the plaintiff was under of proving at the trial that the defendant was in possession when the plaintiff commenced his suit. He did not and could not give such proof, and the defendant insists that the plaintiff should in consequence have been nonsuited. I cannot say that I see my way clear to such a conclusion. The 234th clause of our act is the same in effect as the 180th clause of the English Common Law Procedure Act of 1852; and according to both, the question at the trial of an ejectment, where there has been no notice limiting the defence to part of the premises, is whether the statement in the writ of the claimant's title is true or false. I do not think we can hold, in opposition to this clause, that in addition to this it is to be a question at the trial whether the defendant was in possession when the action was brought.

It has not been taken, so far as I know, to be necessary, in trials since this act, to give proof of that fact, either here or in England, and all that should distinguish this case from others in that respect, is that before the defendant entered his appearance he had given notice of his having quitted possession, and that, when he did afterwards enter an appearance defending for the whole, he did not file with it a notice asserting any title in himself, but a notice admitting the plaintiff's right and disclaiming any title in himself. Upon these points, I do not see that the notice given before the appearance, or with it, threw upon the plaintiff a peculiar necessity for proving the defendant in possession, after the defendant had filed of record an appearance, in which he

states expressly that he defends for the whole. It is not for the defendant to contend that this language did not mean what it imports, or that he could not retract his former notice, and put the plaintiff to proof of title, if he desired to do so; and besides, the notice which the statute directs should be filed with the defence is not for the purpose of putting the defendant in a condition to question the plaintiff's title, but only to open the way for such proof as the defendant may be able to give of any title in himself.

On the whole, therefore, I do not think the plaintiff could properly have been nonsuited at the trial for not proving the defendant to have been in possession when the writ was sued out and served, for that formed no part of the plaintiff's case on a record made up as this was.

Secondly. I think that the defendant, having filed such an appearance as he did, warranted the record being made up, as it was, if the plaintiff under the circumstances was justified in instituting the suit, and in taking it to trial, because, though the defendant did not file with his appearance a notice setting up any title in himself, yet the effect of that omission would only be to preclude his giving evidence of any title that he might have.

And though it is true that the notice which he did file contained an unequivocal admission of the plaintiff's title, yet his appearance filed at the same time declared his intention to be to defend for the whole, and we cannot say which of these simultaneous declarations should be looked upon as nullifying the other.

Thirdly. But though I take this view of the record, and what might be done and insisted upon under it, I think at the same time that the bringing the action under the circumstances, and still more the carrying it down to trial, when there was really no object in it, was altogether unnecessary and vexatious, though probably not so intended; and that we should therefore set aside all proceedings subsequent to the writ.

I do not think we should give costs to the defendant, because his own proceedings have been inconsistent, and he could and ought to have applied more promptly.

The plaintiff might perhaps have applied successfully to strike out defendant's appearance under the 230th and 231st clauses, having received his declaration that he was not in possession, but the effect of that would still have been to leave the defendant liable to the costs, if judgment had been entered up as for want of appearance, unless the court interposed by its order for the defendant's relief.

BURNS, J.—The defendant's argument, that he was compelled to appear and defend in some way, is based upon two propositions. *First*. Inasmuch as the plaintiff treated him as being in possession, and served him with the writ, if he did not appear to it he would, as upon a judgment by default under the 231st and 260th sections of the Common Law Procedure Act, 1856, be subjected to costs; and, *secondly*, as it appears from the notice attached to the writ that the plaintiff was claiming as landlord of the premises against the defendant as an overholding tenant, he might claim mesne profits, and the defendant be subject to it, though nothing was said about that in the notice, under the 267th section.

The defendant, in appearing to the writ, has given notice that he had given up the possession of the premises at the expiration of his term, and that he claimed no title to the same. The defendant contended at the trial that he could dispute the plaintiff's right to put him to costs, and also could dispute any claim for mesne profits, under the appearance and the notice; and as respects the notice, that it was given because the 224th section compels him to give a notice with his appearance, and as he could not give the notice which that section says he *shall* give, therefore he availed himself of the 228th section, and contended that his notice would apply under that section. It is apparent the 228th section does not and never was intended to apply in a case like the present. It means where there is a contest between the litigant parties, and the party who appears or desires to appear for some portion of the premises, and defend for that portion alone, may do so by limiting his defence to such portion. The two clauses are somewhat inconsistent with each other, for the 224th section says that the notice given under

that section shall be filed with the appearance, and it contemplates *all* appearances to *all* writs of ejectment; and the 228th section says, that the notice of limited defence shall be served within four days after the appearance, upon the attorney whose name is endorsed upon the writ, and if none, then to be filed in the proper office; and an appearance without such notice confining the defence to part shall be deemed an appearance to defend for the whole. I cannot imagine it was intended there should be two notices—one with the appearance, which if drawn up as directed in the 224th section must be not only a denial of the plaintiff's title but an assertion of some kind of title in the defendant; and, then, if the defence is to be limited to a part, that there should be another notice to that effect. It appears by the corresponding sections of the English act, that when the defendant enters his appearance he gives no notice with that proceeding.

The plaintiff has treated the notice filed in this case as so far a compliance with the 224th section, that he has not moved to take the appearance off the file, and therefore we need not consider the difficulty created by the two sections. It appears to me sufficient to say that the 228th section affords no warrant for the notice given in this case. It then remains to be considered, whether the defendant is right in the position he contends for upon the appearance as a defence, and whether he can successfully upon that defend himself against this action.

The 234th section enacts, that if no special case be agreed to the claimants may proceed to trial as in other actions, and the question at the trial shall, except in the cases in the act afterwards mentioned, be whether the statement in the writ of the title of the claimants is true or false, and if true, then which of the claimants is entitled, and whether to the whole or part. There is no necessity for the claimant to give notice of claiming mesne profits in order to recover them. In *Smith v. Tett* (9 Ex. 307) the court say "The claim for mesne profits must be considered as included in all these writs." I suppose the right to recover mesne profits, however, is a matter to be inquired into, as the 267th section says, after proof of the claimant's right to recover



possession has been gone into; and that right, I take it, means the title as spoken of in the 234th section, which is to be contained in the statement in the writ. For the mere purpose then of defending himself against any claim for mesne profits, the defendant had no occasion to enter an appearance. The entry of appearance is a defence against the title of the claimant, and I do not think the plaintiff could have taken judgment, because of the notice which the defendant gave.

It appears, from the evidence taken, that the defendant was not in possession of the property at the time the writ was sued out, and therefore the plaintiff sued out the writ without any occasion to do so. The writ is to be directed to the persons in possession by name, and to all persons entitled to defend the possession. Whether the affidavit of service of the writ, since the alteration from fictitious parties to the real parties, requires to be as special as formerly, in stating that it was served upon the persons in possession, does not appear yet to be settled. See *Edwards v. Griffith* (15 C. B. 397). In *Thompson v. Slade* (25 L. J. Ex. 306) the writ was served upon a person in possession, but not directed to him, and he applied to set aside the writ for irregularity, but the court held that he had waived his right to do so, because he had applied for particulars of the plaintiff's residence. The court evidently avoided the question, whether a person served with the writ could apply to set it aside for irregularity because he was not named in it. If he did not appear to it, and being in possession, he would be turned out of possession, though he would not be liable to costs, not being named. See *Harrington v. The Assignees, &c., of Bytham* (28 Eng. Rep. 443). The probability is, that a writ served upon a person not named would entitle him either to consider himself as a defendant, or he might move the court to be allowed to enter an appearance. This case is the reverse of that, and the writ is directed to a person not in possession, and who informs the plaintiff by his notice that he has no claim whatever to the possession. Can he then apply to the court to set it aside as irregular, because directed to him as being in

possession, when in point of fact he was not so at the time of suing it out? I was much inclined at first to think he could not do so, and that the defendant's only course was to enter an appearance, and compel the plaintiff to prove at the trial that he was in possession at the time of suing out the writ. Upon consideration, however, of the 234th section, I think it is only the title to possession which is to be tried, and not the fact of who is in possession; and therefore, if there be any dispute by the defendant whether he is subject to the writ, that dispute must be settled upon application, whether it be regularly issued or not. It can only be directed, as before stated, to the persons in possession by name, and to all persons entitled to defend the possession. The defendant's name being introduced compelled him to take notice of it, in order to save himself from costs, though he had given up the possession. It appears to me his proper course was to have applied to the court to set the writ aside as being irregularly sued out, and not to have appeared to it. Not having done so, but having entered an appearance, which was wrong, the best course is perhaps to set aside the whole proceedings, including the writ, without costs.

McLEAN, J., concurred.

Rule absolute.

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### GFROERER V. HOFFMAN.

#### *Libel—Excessive damages—New trial refused.*

In an action for libel, the imputations being of a very slanderous character, and a plea of justification pleaded which was not attempted to be proved, the court refused a new trial for excessive damages, though they would have been much better satisfied with a smaller verdict.

CASE, for publishing in a certain circular a libel of the plaintiff, in the German language. The alleged libel was set out in that language in the declaration, and a translation into English given. It was addressed "To the public," and headed "Statement of the seven rough lies and slanders which were contained in a sheet which the long-fingered Peter Gfroerer circulated last week with the prospectus of the new 'Preston Gazette' through the public."

This statement professed to answer some publication which had been issued by the plaintiff in reference to certain moneys alleged by the defendant to have been stolen from him in the village of Hamburg, and for which he had caused a search warrant to be executed at the place of residence of the plaintiff; and it referred to various matters contained in that publication, and represented them as so many lies which the plaintiff had circulated concerning the defendant and his alleged loss of money. The ground of suspicion against the plaintiff and another person, as stated on the trial, was that a letter was found in the trunk in which the money had been contained, and which was carried into a field at some distance from the house, from a Mr. McKenzie of Dundas to a Mr. Nevills at Hamburg, which letter had been, with various other papers, in a room at Nevills' house, to which the plaintiff and one or two others only had access, besides the members of Mr. Nevills' family. And in reference to that letter the libel complained of stated, "It was not alone that letter and its relationship, but it was your loafer name in Hamburg—that is, a name of a person who roams about without work, and earns nothing, and still lives well—that induced me to cause a house search to be made at your long-fingered Mr. P. Gfroerer and *consorts*, for 'bad company corrupts good morals,'—or, 'go with, hung with,'—is not that the saying? And do you not doubt yourself that one man could carry the big ladder upon which the thieves got in." In another part of the libel, as set out, the defendant said, "Finally will I acquaint you with an article of my belief? I believe, namely, it is better to be an honest trading Jew, than a notorious swindler, cheat, gambler, defrauder, defaulter, soul-trader, under the sign of humanity. I believe further, that you never were punished for proved depravity."

The declaration, after setting out the whole libel, alleged that the defendant meant thereby that the plaintiff had stolen his trunk containing the sum of seven hundred dollars, also goods out of his (the defendant's) store, ready-made clothing, muslin and shawls; also that the plaintiff was a notorious swindler, cheat, gambler, defaulter, and soul-trader, and that the plaintiff had never been punished

for past crimes ; defendant intending thereby to injure the character of the plaintiff in the eyes of the public ; so much so that they would not trust him, nor subscribe for the paper which the plaintiff was then printing. By reason of which said false, malicious, and defamatory words so published by the defendant, the plaintiff hath been greatly injured in his credit and reputation, and hath suffered great inconvenience and pecuniary loss ; and the plaintiff claimed £1000.

*Pleas*—1st. Not guilty. 2ndly. That the several matters and charges contained in the said circular, and in the declaration mentioned, were and are true in substance and fact, wherefore the defendant committed the said supposed grievances in the declaration mentioned, as lawfully he might do, for the cause aforesaid.

The trial took place at Berlin, before *McLean, J.*

The publication of the libel was admitted by the defendant after a witness was examined for that purpose, a printer in the office in which it was published ; and the same witness stated that it was in reply to a previous publication of the plaintiff against the defendant, which he had seen, and further that he was well aware that it referred to the plaintiff.

Mr. Otto Klotz proved that he had made the translation from the German, as stated in the declaration : that it was not a literal translation, but was correct in substance, and that he understood it to charge the plaintiff with the stealing of the defendant's money and other articles, and with his being a swindler, a cheat, a gambler and a defrauder. Mr. Klotz further stated that the plaintiff was the owner and conductor of a newspaper called the " Preston Gazette," and that the defendant was carrying on business in Berlin.

A witness of the name of Meyer, who had been charged with the plaintiff on the suspicion of having stolen defendant's money, and whose premises were searched, stated that after the accusation preferred against himself and the plaintiff by the defendant, the plaintiff published a statement in German as to the circumstances, and referred to the charge as a fabrication by defendant : that the plaintiff had removed to Preston before the accusation, and that he, Meyer, had



been requested to get subscribers for the paper intended to be published there by the plaintiff: that he did not get any subscribers, but he could not say whether the defendant's statement, in reply to the plaintiff, was the cause of their unwillingness to subscribe or not: that some persons spoke of the publication as likely to be injurious to the plaintiff.

The statement of the plaintiff, which seemed to have provoked the defendant to write the alleged libel, was produced in court, and read in the German, and explained, with the consent of parties, by Mr. Klotz, as it could not without such consent have been received.

The defendant also called a Mr. Nevills, a merchant in Hamburg, who stated that the defendant came to him in a great state of excitement, and enquired where a certain letter was kept by Nevills, which was addressed to Nevills, and found in the trunk from which the money of defendant was said to have been stolen: that on hearing from Nevills that the letter had been with other old papers in a room used as a ware-room, he enquired from Nevills who had access to the room, and was told that the plaintiff and several others had been in the room to remove a printing press from thence, which had been stored there, and that no other persons had been in the room unless some of Nevills' family: that on this information defendant went before a magistrate, and caused a search warrant to be issued. No further attempt was made to prove the truth of the second plea, and the jury gave a verdict for the plaintiff, and £200 damages.

*Read* obtained a rule *nisi* to set aside the verdict and grant a new trial, on the ground of excessive damages.

*McMichael* shewed cause, and cited *Batchelor v. The Buffalo and Brantford Railway Company*, 5 C. P. 127.

McLEAN, J., delivered the judgment of the court.

The verdict certainly appeared to me, after hearing all the evidence, to be much larger than the circumstances required. The parties had been at variance, in consequence of the proceedings against the plaintiff and another person by the defendant for the alleged larceny of his money, and the plaintiff had published an article reflecting upon the

defendant for having acted as he had done, and alleging in fact that there had been no robbery, and that the whole charge was a fabrication, for some unworthy purpose, by the defendant.

The libel complained of was written as a reply to that communication, and the evidence did not in fact establish that the plaintiff had sustained any special damage, as alleged, in preventing persons from becoming subscribers to his newspaper, nor did it in truth shew that any damage whatever had been occasioned to the plaintiff by it, though some persons spoke of it as likely to prove injurious to him. The parties are German, and the publications were in German, and few persons but those who understood and could read that language were likely to take any interest in them. In that section of the province, however, the population consists principally of Germans; and giving to the libel the interpretation and meaning alleged in the declaration, which is not denied by the defendant, there is no doubt that, if suffered to pass unnoticed, it might have proved extremely injurious to the plaintiff in its effects.

The defendant has not only not denied the meaning attached to the libel in the declaration, but he has placed on record a plea that the several matters and charges in the declaration mentioned were and are true in substance and in fact, which plea he has wholly failed to support by evidence; and now he does not urge as a ground for a new trial that the verdict is not in accordance with the evidence, but he says that the amount is excessive. That was a question entirely for the jury, and they may have allowed an increased amount in consequence of the justification set up, and its being wholly unsustained by evidence (a).

The amount is exceedingly large, and we should have been

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(a) See a *nisi prius* case noticed in the Law Times, August 29th, 1857, an action for libel brought by an attorney, in which, defendant's counsel having ridiculed the profession and assailed the character of the plaintiff, Lord Chief Justice Cockburn told the jury, that if they thought it was a libel, and directed against the plaintiff, "a defence of that description is ten-fold, if not an hundred-fold, an aggravation of any libel which can be brought against a man for any departure from the propriety of his profession."

\* \* \* "a most grievous aggravation, and one which it is your bounden duty to take into your serious consideration."

better satisfied, and considered the verdict more reasonable and just, had half the amount, or even much less, been given as damages to the plaintiff; but large as they certainly are, they are not so excessive, under all the circumstances, as to afford a sufficient ground for setting aside the verdict. Charging the plaintiff with being long-fingered, in connexion with an accusation of stealing money, and calling him, in a publication issued as a circular and freely distributed, a notorious swindler, a cheat, a gambler, and a defaulter, are certainly imputations of so slanderous a character, that a jury, considering the deliberate manner in which they were put forth, might feel quite justified in giving large damages.

Under these circumstances we do not see that the court can properly interfere, or that a new trial can be granted, to afford a chance to the defendant of having the damages reduced.

Rule discharged.

# MERRIL v. BEATY.

## *Bankruptcy—Set-off—Judgments.*

Defendant, in September, 1848, recovered judgment against the plaintiff for a large debt, on which he afterwards took out a commission of bankruptcy, and proved for his claim. Plaintiff afterwards obtained a verdict and judgment against defendant, for £50, on which he issued execution. No certificate had been granted under the commission, and nothing done beyond the appointment of an assignee.

*Held*, that the defendant could not set off his claim, for which he had proved under the commission, against the plaintiff's judgment.

On the 14th of February, 1857, a judge's summons was obtained upon the plaintiff, to shew cause why satisfaction should not be entered on the roll in this cause, on the defendant acknowledging satisfaction for the same amount on the judgment obtained by him against the plaintiff, or such other relief granted as might be ordered, on grounds disclosed in affidavits filed.

On the 28th of February, 1857, this summons coming on to be heard before Mr. Justice *Hagarty*, he made an order that proceedings on the judgment in this case be stayed till the fifth day of next term (Easter), and that the plaintiff should then show cause in full court why the said summons should not be made absolute, and a rule of the

court made to that effect, or such other relief granted as the court might think fit ; and that the plaintiff's assignee, John C. Boswell, Esquire, appointed on the 6th of February, 1849, should be served with a copy of the order.

The summons had been obtained on an affidavit of the defendant, that an execution in this suit against his goods had been placed in the sheriff's hands on the 26th of January, 1857, endorsed to levy £50, with costs, interest, &c. : that on the 7th of September, 1848, he recovered a judgment also in the Queen's Bench against the plaintiff in this suit, for £1,003 12s., nominal damages and costs, the true debt being £560, with interest from the 5th of August, 1848 : that £133 2s. 9d., and no more, had been paid on account of that judgment, the remainder being still due to him, about £434.

The defendant, since the order, filed an affidavit of one John Beaty, junior, that the plaintiff, Merrill, left Canada in the year 1849 or 1850, and had never returned ; and that he was not aware whether he was still living or not.

On the other side, it was sworn that a commission of bankruptcy was taken out by the defendant against the plaintiff, and was proceeded with until the appointment of an assignee by the defendant, namely, Mr. John Crease Boswell, on the 6th of February, 1849 : that the plaintiff never obtained or applied for a certificate under that commission, which still stood in force as issued, not superseded or annulled, and not closed : that this defendant proved his claim under the commission against the plaintiff in the Bankruptcy Court, at Cobourg, on the 1st of February, 1849, which claim included the judgment entered upon the 7th of September, 1848 : that the present action was for trespass and false imprisonment : that the verdict in it was not rendered till May or June, 1849, after the commission of bankruptcy had issued : that judgment was not entered in this cause till this winter (1857), because the defendant absconded soon after the verdict was rendered against him : that the plaintiff was indebted to his attorney " for services rendered by the attorney, as such, for him, in a sum exceeding £100 : " that the plaintiff consented and agreed with his



attorney that the latter should hold the verdict in this cause, in security for the amount so due to him for costs as aforesaid, so far as it would extend; and that when collected the attorney should retain the amount on account of his said debt." And the plaintiff's attorney, who made this affidavit, swore that he had no other security for the debt which the plaintiff owed him; and that if this application to set off the judgment succeeded, he would certainly lose the amount thus set off.

*J. D. Armour* shewed cause, and cited *Francis v. Dods-worth*, 4 C. B. 202.

*Burns* contra, cited *Simpson v. Lamb*, 28 L. T. Rep. 245 Q. B.

' The statutes referred to are noticed in the judgments.

ROBINSON, C. J.—By the 18 Vic., ch. 85, an act passed for continuing for a limited time the several acts and ordinances therein mentioned, it is enacted (section 2), that the Bankruptcy Act, 7 Vic., ch. 10, and the statute 9 Vic., ch. 30, amending the same, in so far only as they are continued by and for the purposes mentioned in the 12 Vic., ch. 18, entitled, "An act to make provision for the continuance and completion of proceedings in bankruptcy now pending;" and the said last mentioned act, and the statute 13 & 14 Vic., ch. 20, entitled, "An act to afford relief to Bankrupts in certain cases shall respectively be and remain in force" till the 1st of January, 1856, and till the end of the next session of parliament.

It appears, then, from the statement of facts, that this defendant, in September, 1848, recovered a judgment against the plaintiff for a large debt, of which £434 is still due to him, besides interest:

That he afterwards took out a commission of bankruptcy against the plaintiff, and an assignee was appointed in February, 1849, and that the defendant proved for this debt under the commission:

That after the commission of bankruptcy, namely, in May, 1849, the plaintiff recovered a verdict in this case against the defendant for trespass and false imprisonment, for £50,

and in 1857 entered judgment on that verdict, and is endeavouring to enforce payment by execution.

The plaintiff has never applied for or obtained a certificate under the commission of bankruptcy, and indeed there seems to have been nothing done since the assignee was appointed.

It seems, upon an examination of the several statutes, that the Bankrupt Act, 7 Vic. ch. 10, has never been allowed wholly to expire, but has been always kept in force by continuing acts passed from time to time, so far (and for that purpose only) as to allow of proceedings being carried on under it in all cases in which commissions had issued before the passing of the act 13 & 14 Vic., ch. 20. The commission against the plaintiff, Merrill, had issued before even the first continuing act 12 Vic., ch. 18, was passed, so that all parties interested in the proceedings under that commission are in the same situation as they would have been in if the first Bankrupt Act, 7 Vic., ch. 10, had been a perpetual, and not a temporary act, so far at least as depends upon the proceedings in bankruptcy being brought to a close; for they have never been interrupted, and, for all we see, may be now resumed, and carried on to completion.

That being so, we have to consider, that although the cause of action on which the plaintiff recovered his verdict for £50 against the defendant was not one upon which the assignees could have sued, yet the judgment which he has obtained upon it forms part of the effects of his bankrupt estate, just as any other judgment which he might have recovered between his bankruptcy and the time of his obtaining a certificate, which this plaintiff has never yet obtained (*a*). The creditors of the estate have therefore the same interest in this judgment as they would have had in a promissory note, or in a sum of money which the defendant might have given to the bankrupt in January, 1857, as a compensation for the alleged battery and false imprisonment, or as they would have had in any judgment which the bankrupt might have obtained while he was uncertificated, for a debt of any kind due to him.

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(*a*) See *Drake v. Beckham*, 11 M. & W. 319; *Silk v. Osborne*, 1 Esp., 140; *Evaus v. Brown*, *Ib.* 170; *Webb v. Fox*, 7 T. R. 391; *Fowler v. Down*, 1 B. & P. 45.

I take it that the circumstance of the plaintiff's judgment being for damages for a trespass, makes it not the less a judgment in which the creditors have an interest, in the same manner as real estate in this province, under the British statute 5 Geo. II., ch. 7, has always been held liable to the satisfaction of judgments obtained for damages in cases of tort, as well as of judgments obtained for debts (a) and on the same principle that a judgment for damages in a case of tort is admitted to constitute a good petitioning creditor's debt, upon which a commission may issue.

It follows, then, that all the creditors of the bankrupt having an interest in this judgment which he has obtained against the defendant, we cannot make such an order as is prayed for, because that would be allowing the judgment to merge in the defendant's judgment against him, and the effect would be that the defendant would get the whole of the £50, instead of his proper dividend, out of it. If the plaintiff's judgment had happened to be for £500 instead of £50, this defendant would be thus getting his whole debt paid instead of abiding by the result of the commission which he himself sued out, and taking his chance with the other creditors.

This judgment of the plaintiff's being obtained long after the bankruptcy, does not form a set off against the defendant's claim upon the estate, which would be deducted under the 35th clause of the statute 7 Vic., ch. 10, so as to make the debt due to the defendant consist only of the balance between the two. That clause is precisely the same as the 50th clause of the English Bankrupt Act, 6 Geo. IV., ch. 16, under which the law was always assumed to be as I have just stated; that is, that the balance, in case of mutual credits, is to be taken as it stood at the time of the bankruptcy (b).

And that is reasonable, because, as to a subsequent debt due to the bankrupt, under a judgment obtained by him since, as in this case, against a creditor who has proved his

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(a) See *Sickles v. Asselstine et al.*, 10 U. C. R. 205.

(b) See *Ridout v. Brough*, Cowp. 135; *Hewison v. Guthrie*, 2 Bing. N. C. 755; *Young v. The Bank of Bengal*, 1 Deac. 622; *Archbold on Bankruptcy*, 10th Ed. 148, 149, 151.

debt under the commission, the right to the money due on that judgment must be either in himself or in his assignees, according as the bankrupt had or had not obtained his certificate. If in himself, he might well urge that the defendant, by having proved his debt under the commission, put an end to his (the bankrupt's) trading, and had all his property taken out of his hands, upon the understanding that he was himself to be restricted in consequence to a rateable dividend out of what the bankrupt's estate would produce; and if the defendant had afterwards beaten and maimed the plaintiff, and thereby subjected himself to an action in which the plaintiff had recovered £1,000 against him, and could pay that verdict by setting off his debt against it which he had proved under the commission, he would thus be paid in full, contrary to the intent of the bankrupt laws.

If the assignees are entitled to claim the benefit of the verdict for £50, the reasons against allowing it to be set off against defendant's debt are more clearly conclusive. We cannot, by granting this application, interfere with the due operation of the bankrupt law, which as to this case is still in force.

It may seem hard that the plaintiff should be pressing an execution for this £50, while his estate owes the defendant a much larger amount. But the defendant, having elected to prove his debts under the commission, is not in a situation to sue the plaintiff for it, and so not in a situation to set it off.

The assignee might intervene and claim the £50, which would turn the money into the right channel, but we cannot allow the set-off upon defendant's application.

It is represented on the affidavit that the plaintiff has been long out of the province, and that it is not known whether he is living; and there is some reason to infer from the affidavits that the execution may have been taken out and pressed, not at the instance of the plaintiff, but by his attorney, for his own benefit. If that be so, the attorney should consider that he has no lien on this judgment for his general account against the plaintiff, but only for his costs



in this particular cause, and we could not recognize him as having any further interest in the matter.

If this defendant, however, is in fact being harrassed unfairly, by being pressed by this execution, and not on behalf of the assignee or creditors of the bankrupt, who have the real interest in the judgment, that would point to the propriety of some application of another kind.

This application must be discharged, but not with costs.

BURNS, J.—There can be no doubt that the cause of action, upon which the plaintiff recovered the present judgment against the defendant, was not one which passed to the assignee, and that the plaintiff had a right to proceed with the action, notwithstanding that he was at the time an uncertificated bankrupt. It is unnecessary to do more than refer to one case, where all the authorities on the point will be found collected—*Beckham v. Drake et al.* (8 M. & W. 846.) The case was reversed upon appeal (11 M. & W. 315); but the point involved in the case before us—namely, that the cause of action which the plaintiff had against the defendant was such that he alone could maintain an action—was affirmed. When the plaintiff obtained his judgment, which was after he became bankrupt, and before he obtained any certificate, I apprehend it became a matter so far changed, that then it must be considered a debt due to him, and as such the assignee would be entitled to the proceeds of it. The judgment which the defendant had obtained against the plaintiff was made the groundwork of the commission of bankruptcy against the plaintiff; at all events, the defendant was the person who caused the commission to issue, and he proved the judgment against which he desires to set off the plaintiff's judgment, as a debt against the bankrupt's estate anterior to the time that the bankrupt, obtained a verdict against him. The defendant, at the time he proved his demand against the estate of the bankrupt sought to obtain his remedy from the same source that the other creditors who proved would do, and that estate became vested in the assignee for the purpose of dividend. Subse-

quently the creditor becomes indebted, either to the bankrupt or to his estate, upon a judgment obtained against him. The question, then, is simply this, can he resort to his judgment, and set it off, or so much of it as will satisfy the plaintiff's judgment? I do not think he can do so.

*First.* Suppose that the plaintiff's judgment is to be treated as a demand, though reduced to judgment, which would still, notwithstanding the bankruptcy, remain vested in the bankrupt, then we must look at the effect the act of the defendant, in proving his demand under the commission, has upon his rights. The statute 9 Vic., ch. 30, sec. 33, enacts, "that no creditor who has brought any action, or instituted any suit against any bankrupt in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the commission against such bankrupt, shall prove a debt under such commission, or have any claim entered upon the proceedings under such commission, without relinquishing such action or suit; and the proving or claiming a debt under a commission by any creditor, shall be deemed an election by such creditor to take the benefit of such commission with respect to the debt so proved or claimed." This clause is similar to those contained in 49 Geo. III., ch. 121, sec. 14, and 6 Geo. IV., ch. 16, sec. 59. In *Read v. Sowerby* (3 M. & S. 78), Lord Ellenborough says, "*Election* here imports that he renounces his other rights for the sake of that which he elects." The same thing is affirmed in *Adams v. Bridger* (1 M. & Scott 441, 8 Bing. 314). The cause of action can make no difference in the right of set-off; and if the debtor had become indebted to the bankrupt for goods sold and delivered, or anything of a similar nature, at a subsequent period, though he might dispute the right of the plaintiff to sue for the demand, he could not set up his judgment as an answer to it. By proving his demand under the commission he elects to take that fund as the source from which he intends to seek payment of the debt, and all future right against the bankrupt is gone, unless the commission be superseded.

*Secondly.* Suppose the right to enforce the judgment

becomes vested in the assignee, then it is equally clear the defendant could have no right to set-off his demand. The demand against him could only be considered as one from the time of obtaining the judgment, which was after the bankruptcy, and then in that demand every creditor of the bankrupt has an interest, as being assets from which to look for dividends. Viewed in this light, and as the known practice in bankruptcy always has been that all debts when proved stand upon the same footing, there could be no set-off by the creditors, unless of a demand which existed before the bankruptcy, and which might have then been set-off. A judgment proved as a debt against the estate of a bankrupt stands upon no better footing than other debts, and has no privileges because reduced to judgment.

For these reasons I think we cannot make the order to set-off the plaintiff's judgment proved under the commission.

MCLEAN, J., concurred.

Rule discharged.

REGINA EX REL. ACHESON V. DONOGHUE (COUNCILLOR),  
AND BENNETT (RETURNING OFFICER).<sup>1</sup>

*Election—Alteration of poll-book—Evidence—Costs.*

At the close of the poll the returning officer declared the relator duly elected, but afterwards he received an affidavit from one M. that his vote had been entered by mistake for the relator, on which he altered this vote in the poll-book, and the numbers being then equal for the relator and defendant, he added his own casting vote as returning officer for defendant, and returned that he was duly elected.

*Held* (confirming the decision of the County Court judge), that the returning officer had no power to alter the poll-book after the close of the poll; that the defendant's election was illegal; and that the relator should be seated.

*Held*, also, that the evidence of the defendant, and of the returning officer, was properly rejected.

Where it was adjudged in the County Court that the returning officer should pay the costs, and it appeared by affidavits filed on appeal that he was insolvent, and that in doing what was complained of he had acted at defendant's instance—*Held*, that this court might alter the judgment below, so as to make the defendant liable for costs as well as the returning officer.

The defendant in this case appealed from a judgment of the judge of the County Court of Frontenac, Lennox, and Addington, in a case of a contested election of municipal councillors for Bedford, Olden, Oso, and Palmerston.

The relator complained that the defendant, Donoghue, had usurped the office of municipal councillor, not being duly elected and returned; and represented that he himself was duly chosen by a majority of voters over Donoghue, as appeared by the poll-book, and was accordingly publicly proclaimed by the returning officer at the close of the election, on the second day, as being duly elected, but that the returning officer did, notwithstanding, at the instance of Donoghue, make an alteration in the poll-book, by giving to another candidate, Taggart, the vote of one McCarthy, which had been received during the election for the relator, and entered for him in the poll, which vote being taken from the relator made his number of votes equal with the number of those for Donoghue; and that the returning officer, after he had thus made the votes equal, gave a casting vote in favour of Donoghue, and returned that he was duly elected. And that no poll-book had been returned by Bennett, the returning officer.

The evidence on the part of the relator was to this effect: that at the general election for township councillors for the four united townships, held last January, just before or at the close of the poll on the second day, the returning officer, on casting up the poll-book, declared that the defendant, with four others named, had the majority of votes; but that there was a dispute about the vote of one Daniel McCarthy, who had given his vote on the first day, and whose vote the returning officer had entered in the column of the relator, Acheson. McCarthy came to the poll the second day, and said his vote had been given for Taggart, and should have been set down for him, when the returning officer told him it was not so: that he heard him vote for Acheson, and he had made no mistake. Acheson insisted that McCarthy had voted for him, and the returning officer added that he would swear to it. Acheson asked McCarthy if he would swear that he had voted for Taggart, and not for him, and told him if he would there should be no more trouble about it. McCarthy said he would not swear.

Before the poll closed, however, the returning officer seemed to have changed his mind, for he intimated that he



intended to take the vote from Acheson and put it down to Taggart, who stood third upon the poll. But taking the vote from Acheson would leave him only sixty-one votes, and make him equal with Donoghue, who stood next below him in the poll-book ; and the returning officer added that as then there would be a tie, he should vote as returning officer for Donoghue, and return him as the fifth member. Acheson and others remonstrated, and told him he could not do that ; when he again changed his mind, and publicly declared Acheson and the four others duly elected, which agreed with the numbers on the poll-book.

On the third Monday in January the returning officer attended at the municipal council, but did not produce his poll-book, saying that he had it not. He had in the meantime, and some days after the election was closed, received an affidavit from McCarthy, that he had not voted for Acheson but for Taggart, and had in consequence, as he stated, altered the poll-book, and had set down his own vote as returning officer to Donoghue, which made his votes sixty-two and Acheson's sixty-one, and he returned that Donoghue was duly elected. He was sworn in, and voted at the election of reeve, and had since continued to sit.

The evidence was contradictory upon the question as to whom McCarthy voted for on the first day. Having heard the evidence fully on both sides, the learned judge came to the conclusion that the election of Donoghue was void, and that he should be removed ; that the relator was duly elected, and ought to have been returned, and was entitled to be received into and enjoy the office. And further, that the relator should recover against the returning officer, Bennett, his costs, to be taxed ; and he adjudged accordingly.

The defendant appealed from this judgment, and moved to reverse it, or so much of it as adjudged that Donoghue's election was void, and that he be removed, and that the relator was duly elected and ought to have been returned, and was to be admitted to the office, and that the relator should recover costs against the returning officer. He took as objections to the judgment :

1st. That the returning officer had power to correct the error in the poll-book in regard to McCarthy's vote.

2ndly. That the judge having received oral evidence in the matter, refused to take the evidence of the returning officer and of Donoghue.

3rdly. That he refused to allow Donoghue to show that the relator had not a majority of legal votes, and with that view to enter upon a scrutiny.

4thly. That a new election should have been ordered, instead of seating the relator.

5thly. That it appeared that McCarthy did not in fact vote for the relator, which established that the relator was not duly elected, and that Donoghue should have retained his seat.

The relator filed an affidavit while the appeal was pending in this court, that the returning officer was worth nothing, and unable to pay the costs in case of the judgment being affirmed, and that it was at Donoghue's instance that he altered the poll-book and his return, after he had declared the relator duly elected, and some days after the poll was closed.

*S. Richards* for the appellant.    *The Solicitor-General* contra.

ROBINSON, C. J., delivered the judgment of the court.

We concur in the view of this case taken by the learned judge of the County Court, and in the manner in which he disposed of it. It may be that McCarthy did in fact vote for Taggart, and not for Acheson: that was on the first day. But if a different conclusion had been come to on that point, we should not have been in favour of reversing the decision of the judge upon that question of fact.

It was on a different ground that the case was disposed of, and we think correctly. The returning officer, after the poll was closed, and he had proclaimed the relator duly elected, could not alter the poll-book and transfer votes as he did. The case of *The Queen v. The Mayor of Leeds* (11 A. & E. 512) is a clear authority on that point. His authority ceased at the final close of the poll. He had only

to return afterwards that which he did then. It would open the door to great abuse, if he could at any time afterwards, of his own accord, or at the instance of others, alter the votes on the poll, and return of his own authority different persons from those whom he had publicly proclaimed to the electors at the close of the poll.

And besides, after he had thereby illegally made the votes equal, he could not give to either candidate a majority by voting himself, when there was no poll open, and the proceedings had been closed.

He should have returned his poll-book, as the law directs, in the same state in which it was when he closed the poll, after finally declaring the result; and the relator should, consistently with that declaration and return, have been admitted to his seat; and then, if Donoghue desired to complain of his return upon any ground, he could do it. We think it was the proper course first to seat the member who was proclaimed elected, and who had the majority of votes entered for him in the poll-book.

The learned judge did right in declining to receive the testimony of Donoghue or the returning officer for they were both parties. And it is clear that their evidence, if it could have been received, could not have altered the facts, which are the ground of the judgment, and which really were undisputed.

As to the costs, it would be hard, certainly, if the discretion given to award costs against the returning officer, should have the effect of throwing the loss of them upon the relator, especially in a case like this, by disabling him from recovering them from the other defendant, when the returning officer is unable to pay them. The direction in the act is that the judge may award costs against the *defendant* or the returning officer. It does not say that costs may be awarded against both, or may be levied upon one if the other should fail. But it is quite clear that under the power given to this court by the 152nd clause of 12 Vic., ch. 81, to reverse or alter the judgment given in these cases by the judge, in the present instance we could, if we thought it reasonable and just towards the relator, or for other reasons, reverse

that part of the judgment which directs that the returning officer shall pay the costs, and direct them to be paid instead by the other defendant in the proceeding. That is a course which would be more stringent against such defendant. He therefore cannot complain of our adopting a less rigid course; and the returning officer, who according to the judgment is solely liable to pay all the costs, cannot complain if he is instead made jointly liable with the other. We hesitated at first on this point, because the word "or" is contained in the provision in 16 Vic., ch. 181, sec. 27, respecting costs, and literally the authority given is to make the one or the other pay. But we think that we are carrying out the intention of the legislature in giving the act in that respect a liberal construction, and directing the costs to be paid by the two, for certainly from the one or the other the relator should have his costs, and there is no reason why the defendant Donoghue should not be made liable to pay them, for it was at his instance, and upon an affidavit furnished by him, and taken to the returning officer some days after the election, that he altered the poll-book and made a new return, when he was *functus officio*, which was altogether illegal.

Our judgment is, that the judgment given by the judge of the county court be affirmed, except as regards the costs; that that part of the judgment shall be altered, by adjudging, as we do, that the costs of the relator shall be paid by the two defendants, Donoghue and Bennett, the returning officer, and that the defendant Donoghue shall also pay the costs of the appeal to this court.

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## DOE DEM. SHEPHERD V. BAYLEY.

*Ejectment—Undertaking to admit title—Construction of.*

An action of ejectment, which had been tried twice, and in which defendant relied upon the Statute of Limitations, was put off when brought down to trial a third time, upon a payment of costs, "also on the condition of the defendant admitting on any future trial of this cause the title of the lessor of the plaintiff to the premises mentioned in the declaration, and the right to recover *prima facie*, unless he shews a superior title to hers on the trial thereof, or any title or defence to defeat the same at law," &c. At the next trial, the plaintiff refused to produce the patent, or admit the issuing or date of it, so that the defendant was unable to go into his defence under the statute.

*Held*, that the plaintiff was entitled to take this course, for the effect of the order was to dispense with any proof or production of title on his part, not merely to oblige the defendant to admit such title when produced; and, as the defence under the circumstances was not one to be favoured, and the verdict not final, the court refused to interfere.—*McLean*, J., dissenting.

EJECTMENT.—The action was brought so long ago as in Hilary term, 1850. The premises in dispute were lot 69 on the south side of the Talbot road in Orford. Upon the trial a verdict was given for the defendant, and a new trial being ordered, it was tried a second time in 1852, before the late Chief Justice of the Common Pleas, and a verdict again rendered for the defendant, which was set aside on the law and evidence, and for misdirection. Why the case had continued so long open and undisposed of was not explained, further than that when it was brought on last for trial, before a special jury, and the defendant moved to put it off, it was sworn on the plaintiff's part that it had been twice before put off at the instance of the defendant, which was urged as a reason against further postponement. It was, however, postponed on that occasion at the defendant's instance. This took place in September, 1856, at the assizes at London, before *Draper*, C. J., and on that occasion, on account of the strenuous opposition made by the plaintiff to the delay, the court felt it proper to impose certain conditions, to which the defendant's counsel assented.

The order drawn up, and signed by the counsel on both sides, as well as by the learned Chief Justice was as follows:

"I do order that the trial of this cause be put off from the present assizes, on payment of the costs of the day, and the costs of the special jury, which the defendant or his attorney have undertaken to pay. Also on the condition of

the defendant admitting on any future trial of this cause the title of the lessor of the plaintiff to the premises mentioned in the declaration in this cause, and the right to recover *prima facie*, unless he shews a superior title to hers on the trial thereof, or any title or defence to defeat the same at law; and also admitting a copy of the evidence given for the lessor of the plaintiff, on the trial, had before the Chief Justice *Macaulay* herein, from his notes, in case the witness should be dead, or not able to attend at the trial thereof, and also the defendant undertaking to go to trial, if necessary, at the next London assizes. Also the defendant agreeing and undertaking that this action shall not abate, as far as his heirs or assigns, or any person claiming through him are concerned, so that the Statute of Limitations as to the premises mentioned herein shall have no further effect than it has in the present action, in case of the death of the defendant."

At the last assizes, at London, before *Richards, J.*, in the spring of this year (1857) the cause was called on. The defendant on the former trials had rested his defence on the Statute of Limitations, and his counsel intending to do so again on the last occasion, it was necessary for the defendant to shew at what time the patent issued, as the Statute of Limitations could not run while the title was yet in the Crown; and for this, and possibly for some other reasons, he desired to have laid before the jury the nature of the title by which the lessor of the plaintiff claimed the property, in order that he might be the better able to make out his own case.

The plaintiff's counsel, on the other hand, contented himself with producing the judge's order, made with consent of parties when the trial was put off at the previous assizes, which he insisted bound the defendant to admit the title to be *prima facie* in the plaintiff, and sufficiently so to entitle him to recover without any thing being proved or produced on his part, unless the defendant could shew a better title in himself, or could otherwise repel the plaintiff's title.

The defendant called upon the plaintiff to produce the title deeds under which he claimed, and to admit that his title was such as was stated in the published report of this

case, when the judgment of the court was delivered in Michaelmas Term, 16 Vic., ordering the last new trial, (10 U.C. R. 310) ; or to produce the judge's notes of the last trial, or to admit that the nature of the plaintiff's title was such as it appeared to be on the evidence therein noted.

The plaintiff's counsel maintained, on the other hand, that it was for the defendant to make out his case, without the assistance of the plaintiff, and that the plaintiff had nothing to do but stand upon the defendant's admission of his title, until the defendant should shew a case, which he (the plaintiff) might find it necessary to repel.

The defendant's counsel thereupon refused to make the admission of title in the terms in which the plaintiff contended he was bound to do by the order, but desired to make it in this qualified manner ; namely, that the plaintiff was entitled to recover *prima facie*, and that her title was set forth in the notes of the former trial before the Chief Justice *Macaulay*.

The learned judge held that the plaintiff was entitled under the consent and order produced, to claim a verdict, unless the defendant could shew a title in himself, or in some one else, that was entitled to prevail against it, or should in some manner shew the plaintiff's title to be invalid ; and a verdict was accordingly entered for the plaintiff.

*Prince*, for the defendant, obtained a rule to shew cause why the verdict should not be set aside and a new trial granted, on the grounds that the verdict was against law and evidence, in this, that the order of *Draper*, C. J., which was the only evidence given on the part of the plaintiff, was not sufficient evidence to warrant a verdict for the plaintiff ; and also for the wrong admission of such order, not being evidence ; and for the misdirection of the learned judge, in directing a verdict for the plaintiff on the mere production of such order, and in his not requiring the production by the plaintiff of the evidence of her *prima facie* title given at the former trial before Mr. Chief Justice *Macaulay*, or the notes of the said Chief Justice of such evidence, and the plaintiff's admission thereof, if produced by the defendant ; and because the defendant was taken by surprise

by the learned judge's construction of the order, and the effect given to it.

*Phillpots* shewed cause, contending that the verdict was correct, and that the order amounted in fact to an admission of the plaintiff's title without its being produced.

*Prince* and *A. McLean* supported the rule, and argued that the order was not evidence of title, and at most was only an undertaking to admit a *prima facie* title when produced; and that the plaintiff ought to recover under it, unless the defendant shewed a better title, or gave such evidence as would shew a right in himself to retain possession. It was further argued, that the defendant could not shew a better title until *some* title was produced by the plaintiff, and that the defendant had been taken completely by surprise by the course taken by the plaintiff's counsel, and the view taken of the order by the learned judge.

The nature of the affidavits filed are stated in the judgment.

ROBINSON, C. J.—The defendant's attorney swears that he had never known of the existence of such conditions as were entered into at the preceding assizes until a short time before the last assizes; and always supposed, until the production of the order at the trial, that the effect of it was only to require the defendant to admit the plaintiff's title, *as it stood upon the notes of the Chief Justice* taken at the former trial.

This seems rather strange, because, whether the defendant's attorney was himself present at that trial or not, he was represented by counsel, who must have been instructed by him, and the written order made by consent could at any time be referred to, and its terms ascertained, either by inspection, or by reference to the defendant's counsel, or to the plaintiff's attorney.

The defendant, George Bayley, makes an affidavit of merits, in which he swears as follows: "That he has a good defence to this action upon the merits, his father having purchased the land which is the subject of the action in or about the year 1823, since which time his family have always been in undisturbed possession of the said lot of



land, which possession is as well of the cleared as of the uncleared portion thereof, we have always been assessed for and paid the taxes on the whole."

His attorney, in his affidavit, gives rather a different, and as I believe, a more correct account of the defendant's claim, when he states, as he does, that "his defence has always been, and is no other than, by virtue of the statute of limitation of actions for the recovery of real property, under which statute he, the attorney, has always advised, and still believes that the defendant has a good and valid defence in the law."

The facts, as they appeared on the trial of the cause before the learned Chief Justice of the Common Pleas, are stated at length in 10 U. C. R. 310.

It will be seen there that the plaintiff, at that trial, made title under a conveyance from Lee, the patentee of the crown, to Thomas Shepherd, her late husband, which was produced and proved, and she claimed as devisee in the will of her husband.

Now, when the defendant was required, as the condition of having the trial again postponed, to make certain admissions which would relieve the plaintiff from the trouble and expense of proving what had been proved before, and would guard him also against the chance of inconvenience from the death or absence of witnesses, he might have consented, as is sometimes done, to admit certain specified deeds, or facts which composed the plaintiff's chain of title; or, since the plaintiff had shewn on the former trial what his chain of title was, the defendant might have consented in general terms to admit without proof the claim of title which the plaintiff had already proved. In either case, it would have remained to be determined by the court and jury whether the deeds and facts so admitted, either specially or by reference to the judge's notes, constituted a legal title or not. An admission in the qualified form supposed would not have amounted to an admission of title, but only of those deeds and facts on which the plaintiff relied for establishing her title.

But it is not unusual, on such occasions, for one party to

exact and the other to consent to an admission of title in a larger sense ; that is, for the defendant to consent, as a condition of the trial being postponed, to admit that the plaintiff shall at the trial be taken to be entitled to recover without proving any thing, in case the defendant shall fail to establish a title in himself, or in some one else. Upon such a consent the plaintiff has nothing to produce or to bring forward, but rests upon the admission of his *prima facie* title, knowing at the same time that it is left open to the defendant to displace his admitted *prima facie* title, if he can.

When we look at the written consent in this case, we cannot deny, I think, that it is one of the kind which I have last spoken of ; and it seems to have been carefully so framed as to place the plaintiff in the favourable position which I have described ; that is, that she should have nothing to shew or prove on her part till the defendant had given evidence of a title in himself or in some one else, which the plaintiff must then have repelled as she could.

After reading that part of the consent in which the defendant agrees to admit, on any future trial, the title of the plaintiff to the premises in question, and her right to recover *prima facie*, unless the defendant shews a superior title to that of the plaintiff, or any title or defence to defeat the same at law, we can only, I think, understand the reference which follows to the notes of the last trial to be a further condition inserted for the benefit of the plaintiff, to enable her more conveniently to meet whatever evidence of title the defendant might set, or rather to secure her against the risk of losing by the delay the evidence by which she had endeavoured to repel the defendant's case on the former trial.

I do not think, upon consideration, that we can hold the plaintiff to have been under any necessity to produce or admit the notes of evidence given on the former trial, or to admit any thing. She had merely the privilege reserved to her, in case any of her witnesses should be dead or unable to attend, to lay before the jury the evidence which her witnesses had given before.

If this be a correct view to take of the position of the

parties, as I think it is, then it follows, that as the plaintiff would have no occasion to say or to prove any thing in the first instance, by way of establishing her right, the defendant would have nothing to reason upon until he had given evidence to make out a case on the other side ; and if his case consisted, as his attorney tells us it did, wholly in setting up a title by twenty years' possession, it was incumbent on him to shew, without the plaintiff's help, when the Statute of Limitations commenced to run. His counsel assumed that it was necessary for him to that end to shew when the patent issued, as the time would not run so long as the title was in the Crown ; and because the plaintiff would not produce the patent, or state when it issued, the defendant would not attempt to go into his case.

The plaintiff, I think, was, under the circumstances, entitled to a verdict, under the express terms of the consent ; and the only question is, whether the defendant ought to be relieved by our setting aside the verdict upon terms, and letting the case go again to trial.

The defendant cannot reasonably ask that, upon the ground that his attorney did not know on what terms the trial had been put off, because that only shews that he did not take measures to inform himself of what it was very necessary to know.

The only real ground for interfering would be that the defendant was under a mistaken impression as to the effect of the consent, which, however, could hardly be, if he had not seen it, and knew nothing of its terms. He might, I think, very naturally have supposed that the plaintiff's counsel would either have his title-deeds in court, or would have no objection to state or to admit the nature of her title ; and though the plaintiff was not bound to do or say any thing, and could simply hold the defendant to his admission, yet I think it is to be regretted that she took that course, because it is in the power of the defendant after all to bring an action in his turn, and expense and trouble would have been saved by admitting on that occasion what there can be no difficulty in proving in another action. Still, undoubtedly, there is often a material advantage in being defendant rather

than plaintiff in an ejectment; and if the plaintiff's attorney could, without violating any agreement, content himself with standing upon his admitted *prima facie* title, and put the defendant to proof of a title, without being assisted by any admissions which the plaintiff was not bound to make, it was in his discretion to do so.

All that can be said is, that this court also has a discretion to exercise under the circumstances. We may grant a new trial, if it appears to us that it would be in advancement of justice to do so. Upon that point, I think we should, without hesitation, grant a new trial, if upon reading the written consent given at the last assizes, or upon the representation of the learned judge who presided at that time, we could imagine that there was the least room for doubt as to what the undertaking imports, or what was really the understanding at the time; but as there can be no room for a difference of opinion as to what was then intended, all that can be said is, that the defendant lost sight of the condition on which the case had been postponed at his instance, and in consequence had not taken proper measures for enabling him to set up whatever defence he had. The plaintiff had a right to keep him to his admission, according to its language and its plain intent, and the defendant can only be relieved by an indulgence on the part of the court.

Then do the ends of justice call for, or rather will they fairly sanction, such an interposition in his favour? If the defendant's case had never yet been tried, I should be inclined to grant him the relief he asks, although in this action the verdict is not final, and it is in the defendant's power to help himself by bringing a new ejectment. But we see the defence which he did set up and attempt to establish on the former occasion. We know, from his own shewing on the first trial, which has passed in review before us (10 U. C. R. 310), how he stands in relation to the lot of land which is now in dispute; and when I consider the evidence which was then given, and the affidavit which he now files I confess I can hardly conceive any thing more remote from justice than the defendant's conduct seems to have been in this matter. I do not see that, consistently with truth, it



can be put in any light more favourable to him than this—that he desires to get hold of a valuable lot of land, which belongs to a distant proprietor, which he never paid for, or bought, or contracted for, according to his own account, with any one who he could have supposed had a right to sell it; and to which he has shewn no better title than that it was near him, and in the absence of its owner he has taken the liberty of using it for a long time as is own; and that he or his father had given a few dollars for the interest of a person in it, who, it must have been well known, had no interest in it at all. If he and his father have been permitted for twenty years to keep exclusive possession of this valuable land, so that it could be said they had during that time dispossessed the proprietor, and if nothing had occurred to affect the operation of the Statute of Limitations in the defendant's favour, then the true owner no doubt has lost the land.

It is true that the jury at the former trial, under the direction which they then received, found a verdict in the defendant's favour, which this court, upon a review of the evidence, considered to be incorrect in point of law, as it was clearly unjust in point of fact. Nevertheless, the defendant has not lost the opportunity of taking the opinion of another jury upon his case; but I think, if he succeeds in his attempt, it ought to be without any particular indulgence being extended to him by this court upon equitable grounds.

It is true that in his affidavit now filed the defendant swears that, if the consent is set aside, he will be able to produce a witness who will swear that he saw a deed of the land made by Miller to his father. This is the first intimation, I think, of the existence of such a deed.

On the former trial the defendant pretended only to have paid a few dollars to Miller's widow, who, as her husband made no will, could have had no title, and he did not attempt to shew that he had any thing in writing even from her. He does not now swear that Miller did ever in fact make such a deed, to his father or to him, but only that if he has a chance he can produce a witness who will swear he saw it. That he might possibly be able to find such a witness no one can deny, but that such a statement would

be true, he does not assert; though if it were true, he could not well be ignorant of it; and besides, he must very well know that, as Miller had no title himself, he could convey none. And the defendant's own attorney, who ought by this time to have known something of his case from himself, swears that he never had and has not any other claim than by virtue of his long possession.

If my brothers had been both of opinion that we ought to set aside the nonsuit, on the ground of an alleged misunderstanding on the part of the defendant, which can certainly not be reasonably accounted for, when the written minute signed by the parties is so distinct in its terms, it is not probable that I should have refused to concur with them; but my brothers not agreeing in their views, it is necessary for me to exercise the same discretion as I should do if I had to dispose of the application alone; and I must say that I think the defendant has no claim to expect the court to interfere in such a case to save him from the consequence of his own blunder, particularly as the verdict is not final.

I am in favour of discharging the rule, and letting the verdict stand.

BURNS, J.—I quite agree with the opinion expressed by the learned judge at the trial, that the effect of the terms upon which the trial was put off on the last occasion, was that the burthen of proof was to be shifted to the defendant, to shew that the plaintiff had no title to the lot in question. We cannot shut our eyes to the fact that it was known to both parties, at the time the judge made the order, that the case had been twice tried before; and though on both occasions verdicts had been rendered for the defendant, yet the court saw plainly that the land belonged to the plaintiff, and not to the defendant, and had set aside these verdicts. Again, at a previous assize, the cause was brought down for trial, and was put off at the instance of the defendant, in 1854. The defendant a second time applied to put off the trial, in September, 1856, which was done upon the terms contained in the order, which was acted upon by Mr. Justice *Richards* as an admission on the part of the defendant

that the plaintiff was entitled to recover, unless the defendant could shew that the plaintiff could not and ought not to recover. Putting off the trial a second time for the defendant was a great indulgence to him; and no doubt the learned judge felt, in putting it off a second time, considering that the court had twice before examined the nature of the defendant's evidence, and had determined against him, that it was right, in giving him the indulgence granted, that it should only be done upon condition that the burthen of proof should be shifted to the defendant, to shew that the plaintiff was not entitled to recover. The argument that the defendant misunderstood the effect of the order is not entitled to any weight now, for if the plaintiff is not entitled to the land, and the defendant is, he may bring his ejectment and establish his right. The argument that to drive the defendant to this course is a prolongation of litigation, instead of making an end of it, is in truth entitled to no consideration, for we see that the defendant, on two previous occasions, put off the trial; and now, on the present application, we see that his attorney, in his affidavit, says the defendant's defence is on the Statute of Limitations against the plaintiff's claim; and the defendant in his affidavit says, that his defence is that the person through whom he claims purchased the land, and had a conveyance of it. The construction of the judge's order putting off the trial being properly that the burthen of proof was shifted to the defendant, and the defendant refusing to go on with his evidence at the last trial, the case is reduced to a matter of favour, whether the court should now interfere; and when we are asked to view it in that light, we ought to look at what the court has done on a former occasion, and how the defendant treated himself as being entitled to the land. On looking at what the court decided formerly, and what the defendant attempted to prove, we see that his claiming through a purchase or conveyance is only a pretence; and so far as the Statute of Limitations concerned the case, that the plaintiff's claim was not barred.

Under these circumstances, it is but just that if the defendant can establish that the plaintiff is not entitled to the

land, and that he has the better title of the two, he should so establish that title by being plaintiff instead of the present plaintiff.

MCLEAN, J.—It is much to be regretted that litigation should be continued which has already been pending since 1850, no doubt at great expense to the parties; but the delay cannot, I apprehend, be wholly imputed to the defendant, as it cannot be supposed that if due diligence had been used the cause could not have been disposed of in a much shorter period, at least ten assizes having been held at which it might have been tried since the action commenced. It is true that the cause has been twice tried, and that it was twice put off by the defendant; but still, had the matter been pressed, there was ample opportunity for having it decided, and if it is further continued, it must be attributed to the course taken at the last assizes by the plaintiff's counsel. He seems to have been satisfied that by the terms of the order he had obtained some advantage, and that he might under it throw every obstacle in the way of the defendant to prevent his entering on any defence.

Had he produced the titles as on former occasions, the defendant would be bound to admit them, and the learned judge would have been quite right in considering them admitted, and receiving them in evidence, and the defendant would then have been bound to shew a better or paramount right to the possession. It would surely have been better with a view to terminate litigation, had the plaintiff's counsel made any admissions, not repugnant to the plaintiff's title, which would have enabled the defendant to enter fully into any defence which he might have to offer; but having an apparent advantage, the plaintiff's counsel would not admit what was the first link in her title, and was content to take a verdict, and thus throw all the costs upon the defendant, though he could not but be aware that there was a misapprehension, at all events, in regard to the order on the part of defendant's counsel, and that a verdict so obtained would not be conclusive as to the rights of the parties, but would



probably compel the present defendant to become plaintiff in another suit.

The learned judge having ruled in favour of the view taken by the plaintiff's counsel, there has in fact been no trial, and the defendant has paid a large amount of costs to have the trial put off last fall, without having obtained the object which he desired : namely, a trial of the case when his witnesses were in attendance. But it may be said that it was the defendant's own fault that he had not such a trial, and that he ought to have been prepared to enter upon his defence, independently of any admissions on the part of the plaintiff. This may be so, but if the defendant was taken by surprise by the unexpected course taken by the plaintiff, that alone would furnish some ground for granting a new trial.

But if there can be any doubt as to the propriety of receiving the order of a judge as evidence of title, without the production of any such title, a further argument, as it appears to me, is furnished in favour of this application ; and it appears to me that such admission, and the effect given to it, are extremely questionable ; and I incline to think that the order did not preclude the necessity of the plaintiff setting forth some title on the trial. The order, and the assent of the defendant to its terms, did not, as it appears to me, amount to anything more than an *undertaking to admit title* ; but the defendant could not properly be called upon to *admit title till it was produced*, and the mere undertaking to *admit it* could not supply the evidence of it. The first step, as it appears to me, on the opening of the case, should be for the plaintiff's counsel to produce the title, and call on the defendant to admit it ; but, instead of that, he merely put in the *undertaking to admit*, and did not produce what was to be admitted ; and then he refused to receive an admission of the title, as it was formerly proved by his own witnesses. This course of proceeding taking the defendant by surprise, and shutting out the defence intended to be offered, I think should not have been allowed to prevail ; and as I think it was such a course as ought not to have been adopted by the plaintiff, if anxious to put an end to

litigation, and to have a fair decision upon the merits, it appears to me that a new trial should be granted, with costs to abide the event ; the undertaking to admit the title, and the evidence referred to in the order, still remaining in force for the benefit of the plaintiff at any future trial.

I do not feel at liberty to enter into the merits of the case in deciding this question. Two juries have found in favour of the defendant, and their verdicts have been set aside ; and the opinion of the court on the evidence of the defendant's adverse possession may be inferred from the fact of two new trials having been granted ; but it is a question for the decision of a jury, and one that I think ought not to be withdrawn from such decision, by giving effect to the verdict rendered for the plaintiff on the *third* trial, under the peculiar circumstances which attended it. I am the more inclined to grant a new trial from the consideration that the plaintiff cannot be put to any considerable expense, the attendance of any witnesses not being required ; and also from the consideration, that if entitled to recover on a full trial of the merits, the delay in recovering possession cannot exceed a month or two,—a delay not very important under all the circumstances.

Rule discharged : McLEAN, J. dissenting.

HUGH KENNEDY V. JOHN BURNES, WILLIAM HOOPER, AND  
WILLIAM DIXON.

*School Trustees—Award as to Teacher's salary, &c.—13 & 14 Vic., ch, 48, secs. 12, 17—Personal Liabilities of Trustees—Second arbitration on non-payment of first award—Finality of award—Justification—Pleading.*

REPLEVIN.—*Plea*, by two of the defendants, B. & H., that the plaintiff and W. K. and J. M. were school trustees of a certain school section, and had agreed to engage one Naylor as school teacher, but differences having arisen as to his salary, &c., an arbitration was held under the statutes in that behalf, and the defendants B. and H., two of the arbitrators, made an award, as follows :—that the said trustees and teacher had on a former occasion submitted their disputes to arbitration, when it was awarded that the said teacher should be paid £50 for his arrears of salary up to the time of his dismissal, and £3 5s. 9d. which by virtue of the statute had accrued due since the said dismissal and before the award, by reason of the non-payment of said £50, together with £6 15s. the costs of said award :—that the defendants B. & H. as such arbitrators, further awarded that the said award was binding : that the moneys mentioned in it were still unpaid : that under the statutes, by reason of the non-payment of said arrears, the said teacher was entitled

to his salary since the said award, amounting to £37 5s 4½d., which the said arbitrators B. and H. awarded to be paid to said teacher, together with the costs of their arbitration; that because the trustees refused to perform such award, said B. & H., by virtue of the statute, issued their warrant to defendant D. to collect such moneys, under which the property in question was seized.

*Second plea*, by defendants B. and H., that the grievances charged in the declaration related wholly and solely to judicial acts done by them in good faith, and within their jurisdiction, and in their judicial capacity of arbitrators duly appointed to determine the differences pending between the said trustees and teacher.

Defendant Dixon also pleaded, in a third plea, that the grievances with which he was charged related entirely to acts done by him under the statute, and while acting in good faith, and within his jurisdiction, as the person named in the warrant, stating it to have been issued by the other two defendants as arbitrators, &c.

The award when produced was as follows: 1st. That the arbitrators having received indisputable evidence of the former award, and of its recognition by the parties, agreed to adopt the same. 2nd. That as the trustees had failed to perform said award, and as by the statute 13 & 14 Vic., ch. 48, sec. 17, the teacher was entitled to his salary at the rate agreed on till fully paid, the said teacher was entitled to his salary from the date of such award to the present time, with costs of the arbitration, making altogether £95 12s. 3½d.; and further, that he was entitled to such salary for all time to come, until he should be paid in full.

The first award was also proved, made in August, 1856, and was to the effect that there was due to the teacher from the trustees £50, for which they were individually liable.

There had been a warrant issued some months before, by the arbitrators who made the first award, and the goods of one of the trustees had been seized under it, and were replevied; and that action was pending for trial at the same assizes as this.

The sum awarded by the first arbitration remaining unpaid, the teacher named an arbitrator and gave notice to the trustees, claiming for his salary since the date of the first award; but they, acting under legal advice, did nothing, and the second arbitration took place without their concurrence.

On the second award the defendants B. and H. issued their warrant to D. to make the whole sum awarded (which included the sum due under the first award) by seizure and sale of the goods and chattels of said trustees.

The teacher had been engaged by the trustees in March, 1856, at a certain salary, by verbal agreement only, and the evidence was contradictory as to the grounds of his dismissal.

*Held* 1. That as the award of the defendants B. and H. proved differed materially from their award as set out in the first plea, such plea was not supported.

2. That the averment of an agreement with the teacher could be supported only by a written agreement.

3. That as by the 13 & 14 Vic., ch. 48, sec. 12, sub-sec. 16, the trustees can only be personally liable when they have wilfully neglected or refused to exercise their corporate powers, such neglect or refusal should have been alleged and shewn in the award to warrant, its directions to levy on the trustees personally. *Semble*, also, that the evidence shewed no sufficient ground for such liability.

*Quere*, per *Burns*, J., whether the arbitrators have authority to determine the question of personal liability on the part of the trustees.

4. That the non-payment of the first award was not a non-payment of the teacher's salary under his agreement, so as to entitle him to such salary after the award; nor was it a matter in difference, within the meaning of the act, which could authorise a second reference.

5. That defendants were not precluded from raising these objections by the provision in the statute that such award shall be final.

6. That the second plea was insufficient on demurrer, for not stating any thing which could authorise an award against the trustees as personally liable.
7. That the third plea, by the bailiff, was bad for the same reason.
8. That if the award had been good as to the salary since the first award, yet the including in it the sum given by such award, and for which a levy had been already made, would make the whole award bad.

The plaintiff, Hugh Kennedy, sued John Burness, William Hooper, and William Dixon, in replevin, for taking and detaining two horses.

The defendants Burness and Hooper joined in pleading a special plea, justifying the taking and detaining under the authority given to them by the school acts 13 and 14 Vic., ch. 48, sec. 17, and 16 Vic., ch. 185, sec. 15.

The plea set forth in substance, that the plaintiff and one William Kennedy and John Murray were school trustees of school section No. 5 in the township of Oneida, in the county of Haldimand, and had as such trustees made an agreement with one Francis Naylor, to engage him as a teacher, he being duly qualified, and did thereby employ him as a teacher for a certain time at a certain salary; that differences arose and were pending between them and Naylor, in regard to the salary, the sum due to him, and other matters; whereupon such proceedings were had, under the statutes in that behalf, that the said trustees neglecting and refusing in the first instance to appoint an arbitrator, and the said Naylor having appointed one on his part, to wit, the defendant John Burness, and notified the trustees of it, as the act directs, and the trustees not naming an arbitrator on their part within three days as the law requires, Naylor nominated defendant William Hooper as the second arbitrator; and the local superintendent not being able to attend, and having chosen one John W. Sinclair to act as arbitrator on his behalf, the said three arbitrators proceeded in the arbitration: and after receiving all the evidence offered to them, and duly considering the same, and after the said Sinclair refusing to join in or execute the award in the same plea mentioned, the defendants Burness and Hooper (the other two arbitrators) did award concerning the premises between the



said teacher and the said trustees, "*to the tenor and effect following* ; that is to say, that such school teacher and such school trustees had on a former occasion submitted their then disputes, as to such hiring of such school teacher, and the amount of his salary in that behalf, and the amount thereof then due, to the award, final end and determination of one Alexander Scobie, John W. Sinclair, and Duncan Fergusson, or any two of them : that the said Scobie and Sinclair, as such arbitrators, awarded in that behalf, amongst other matters, that the school teacher was engaged by the said trustees for the period of nine months from the 11th of March, 1856, at a salary of £100 per annum : that such school teacher was improperly dismissed by such school trustees in that behalf, and without being fully paid for his services in that behalf ; and in consequence thereof, that such school trustees should pay such school teacher £50 for such arrears, and the further sum of £3 5s. 9d. for salary, which had, under and by virtue of the statute in such case made and provided, accrued due by reason of the non-payment of such £50 for the period of twelve days ensuing such dismissal, and previous to such award and the further sum of £6 15s. for the costs and charges of and concerning such award ; and the defendants John Burness and William Hooper, as such arbitrators aforesaid, did further award in that behalf, concerning the premises to them submitted as aforesaid, that the said award was binding and conclusive on such teacher and such school trustees : that the said arrears of salary of the said school teacher, and said moneys mentioned in such award, are still wholly due and unpaid : that under and by virtue of the statutes in such case made and provided, and by reason of the non-payment of the said arrears of salary of the said school teacher, such school teacher was entitled to be paid his said salary for the period which elapsed from the making of the said award of the said Scobie and Sinclair to the time of the making of the award of the defendants Burness and Hooper, amounting to £37 5s. 4½d., which said defendants Burness and Hooper, as such arbitrators, awarded to be paid by the said school trustees to

the said teacher, together with the costs of their arbitration, amounting to £4 10s. of all which premises the said school trustees had full knowledge and notice.

“And because the said trustees neglected and refused to perform such award of the said Burness and Hooper, they, the said Burness and Hooper, as such arbitrators as aforesaid, by virtue of the premises, and under and by virtue of the statute in such case made and provided, issued their warrant to the defendant William Dixon, who was duly named therein, to enforce the collection of such sums of money so awarded by them to be paid as aforesaid, and delivered such warrant to the said defendant William Dixon to be executed ;” and the plea then avowed the seizure of plaintiff’s horses by the defendant Dixon under that warrant, &c.

The plaintiff put in for replication to this special plea the following: “The plaintiff joins issue on the first plea of the defendants John Burness and William Hooper.”

In a second plea the same two defendants Burness and Hooper pleaded that the grievances with which they were charged in the declaration related wholly and solely to judicial acts of them, the said two defendants, by them acting in good faith, and within their jurisdiction, transacted, and in their judicial capacity of arbitrators duly appointed under and by virtue of the Common School Acts, to award in the matter of a difference then pending between the said school trustees and the said school teacher Naylor, in regard to his salary as teacher, and the sum then due to him in that behalf, and other matters then in dispute between such school teacher and such school trustees.

The plaintiff demurred to this plea, alleging that it constituted no defence.

The other defendant Dixon pleaded a special plea, justifying as bailiff employed to execute the warrant, to which plea the plaintiff replied by taking issue upon it, in the same form of words as he did to the first plea of the other defendant.

This defendant Dixon pleaded also a second plea, to the effect that the grievance with which he was charged in the declaration wholly and solely related to acts done by him

under and by virtue of the statutes, &c., while acting in good faith, and within his jurisdiction, as the person named in the warrant for executing the same: stating the warrant to have been issued by the other two defendants as arbitrators under the common school acts, for collecting the sum of £97 10s. 9d. by them within their jurisdiction as such arbitrators awarded to be paid by the plaintiff and the other trustees to Naylor, the school teacher, for his salary, including the costs of arbitration in that behalf.

The plaintiff demurred to this plea.

Upon the trial of the cause, at Cayuga, before the judge of the County Court of Simcoe, then holding the assizes under the provisions of the statute 19 Vic., ch. 43, sec. 152 (a), it was proved that the award made by the defendants Burness and Hooper had been lost, but the following paper was put in, and was sworn to be a copy by Naylor, who stated that it was made by himself from the original.

It was in these words: "To all to whom these presents shall come, &c., We, John Burness, William Hooper, and John W. Sinclair, to whom were submitted the matters in difference between Francis Naylor, the school teacher, and Hugh Kennedy, William Kennedy, and John Murray, trustees, &c., the said John Burness acting for the said Francis Naylor, and the said William Hooper acting for the said Hugh Kennedy, William Kennedy, and John Murray, they having failed to name and appoint an arbitrator on their behalf, after being duly notified by the said Francis Naylor, and the said John W. Sinclair having been appointed to represent the Rev. Dr. Ferrier, the local superintendent, do, on this 30th day of December, 1856, after due deliberation, make this our award as follows:

"*First.* Having received indisputable evidence of a former arbitration in the matter now under consideration, which was mutually agreed to, and that the terms of the award were recognised by the parties concerned therein, and a promise to pay the sum of £53 16s. 11d., by the said Hugh Kennedy, William Kennedy, and John Murray, to the said Francis Naylor, do deem it unnecessary and unadvisable to examine that matter further, but unanimously agree to adopt the award of former arbitrators.

"*Secondly.* Finding that the above-named trustees have failed to perform what the first arbitrators required of them,

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(a) Since Repealed by 20 Vic., ch. 57, sec. 30.

and that the above-named teacher's salary is still unpaid, also that for the protection of teachers of common schools in Upper Canada it is enacted (13 and 14 Vic., ch. 48, sec. 17) that any teacher shall be entitled to be paid at the same rate mentioned in his agreement with the trustees, even after the expiration of the period of engagement, until the trustees shall have paid him the whole of his salary as teacher of the school according to their engagement with him, do, adhering strictly to the said enactment, unanimously agree that the said Francis Naylor, teacher, is entitled to his salary from the date of the first award to the present time, amounting to £37 5s. 4½d., together with £4 10s., the costs of holding this arbitration, which several sums amount to £95 12s. 3½d; and anxious still further to protect the teacher, we do, in accordance with the above in part recited act, order and determine that the said Francis Naylor, teacher, is entitled to his salary for all time to come, so long as the said Hugh Kennedy, William Kennedy, and John Murray, trustees, shall refuse to pay him his salary as their teacher."

Signed and sealed by

JOHN BURNES,  
WILLIAM HOOPER,  
*Arbitrators.*

And on the 5th of January, 1857, the two defendants Burness and Hooper, who made this award, made a warrant, under their hands, as follows: "We, the undersigned, arbitrators between Francis Naylor, of the first part, teacher, and Hugh Kennedy, William Kennedy, and John Murray, trustees of school section No. 5, Oneida, county of Haldimand, of the second part, by virtue of the authority vested in us by school act 13 & 14 Vic., ch. 48, sec. 17, authorise and appoint William Dixon, by seizure and sale of goods and chattels of any or all of the above-named Hugh Kennedy, William Kennedy, and John Murray, trustees, &c., to make £97 10s. 9d., the sum by us awarded to the said Francis Naylor as salary, including costs of arbitration.

It was proved that an arbitration had taken place between Naylor and the school trustees, Scobie, Fergusson and Sinclair being the arbitrators, and that an award was made by Scobie and Sinclair, as follows, in which the other refused to join, "that there is due (5th August, 1856) to the said



Francis Naylor from the said trustees the following sum, for which they were individually liable, viz., £50, being the full amount allowed by us under the said contract or agreement, also £3 5s. for twelve days from the 23rd of July to this date, as authorized by the 17th section of the act, &c." The arbitrators awarded costs to themselves, and that in default of immediate payment the amount should be levied.

In December, 1856, Naylor's salary remaining unpaid, a notice was served by him on the trustees requiring them to name an arbitrator, and stating what person he had appointed.

The trustees having taken legal advice, declined naming an arbitrator, and took no part in the proceeding.

Naylor had been engaged as a teacher on the 12th of March, 1856, for the remainder of that year, at the rate of £100 per annum. It was merely a verbal agreement; there was no written contract with him.

In the beginning of July following he had some dispute with the trustees, as he swore upon the trial, in relation to the hour of his closing the school, in consequence of which the trustees closed the school altogether, and dispensed with his services. This was his account of the matter.

William Kennedy one of the trustees, swore that Naylor was verbally engaged till such time as he should pass the board of public instruction, and that he was to receive £100 per annum if he gave as good satisfaction as the previous master had done: that he taught for three weeks, when a complaint was made of his incapacity. Being told of this, he said he was quite willing to withdraw, and agreed to do so on receiving one month's salary.

Murray, another trustee, swore that when they told Naylor he was not giving satisfaction, he said he knew he was not; and that his month's salary was tendered to him, but he declined it: that the trustees were parties to the first arbitration, and named an arbitrator: that he offered Naylor £40, but he refused it: that when the trustees received notice of a second arbitration they determined to have nothing to do with it. In the notice which Naylor gave to the trustees of this arbitration he stated his claim to be for salary since the date of the first award."

There had been a warrant issued some months before by the arbitrators who made that award, to collect the sum directed by it to be paid, viz., £53 5s. and the costs of that award; and a horse and a buggy were seized under it, which were replevied, and the action of replevin was brought to trial at the same assizes, against the arbitrators who made the first award, the plaintiff being William Kennedy, whose property was seized on that occasion.

The claim brought before the second arbitration was for Naylor's salary as a teacher, and for compensation for delay in payment of it, and of the amount awarded to him on the first arbitration.

The plaintiff's counsel at the trial contended that the defendant's plea of justification, on which issue was joined, failed on several grounds, which were in substance the same as those mentioned hereafter, relied upon and argued in banc on the motion against the verdict; but his objections were for the time overruled, and the learned judge called the attention of the jury to the several statements in the first plea, and directed them to find a verdict for the defendants, if they found those statements substantially proved, reserving leave by consent to the plaintiff to move to have a verdict entered for him for 10s., if the court should be of opinion that the plaintiff's objections to the defence were entitled to prevail.

The jury gave their verdict for the defendants.

*Start* obtained a rule *nisi* to have the verdict set aside, and enter a verdict for 10s. for the plaintiff; or for a new trial, on the ground of misdirection, and the improper rejection of evidence—contending that the award made by the defendants Burness and Hooper was void, being unauthorized under the common school act, in directing a warrant to issue against the personal goods of the plaintiff, for that an award could only be made against the trustees as a corporation under the act: that the award did not set out such facts as would render the trustees personally liable; and that it was bad, otherwise, on the face thereof, as not shewing any legal defence for seizing the goods of the

trustees individually ; also in shewing that it was grounded not upon any written contract with the school teacher, but on a mere verbal agreement ; and in not shewing any thing sufficient on the face of it to make the plaintiff liable personally, as an individual, there being no allegation or proof that the plaintiff had wilfully neglected or refused to exercise the corporate powers vested in him and the other trustees by law. And that the mere production and proof of the award was not sufficient to support the plea, without evidence of the submission.

*J. R. Martin* shewed cause, and cited *Miller v. Gzowski*, 6 C. P. 71 ; *Faviell v. Eastern Counties Railway Co.*, 2 Ex. 344 ; *Clark v. Ruttan*, 6 C. P. 97 ; *Tunno v. Morris*, 2 Cr. M. & R. 298 ; *Broom Leg. Max.* 70.

The demurrers were argued at the same time.

*Start*, contra, cited *Fisher v. Pimbley*, 11 East 188 ; *Dresser v. Stansfield*, 14 M. & W. 822 ; *Candler v. Fullar*, Willes 62 : *Storke v. De Smeth*, Ib. 66 ; *Russ. on Arb.* 507.

The statutes cited are referred to in the judgments.

ROBINSON, C. J.—Independently of any legal objections, the course which has been pursued towards these trustees is singular, and has the appearance of being very unreasonable. Admitting that the teacher's dismissal was without good cause, of which we know nothing further than that the first arbitrators seem to have thought so, and admitting also that his dispute with the trustees on that account, and his claim that he thought proper to make in consequence, were matters that could rightly be referred to arbitration under the statute 13 & 14 Vic., ch. 48, sec. 12, yet, after there had been such a reference, and an award made under it, giving him £53 5s. for his salary up to the making of that award, which covered a period of six months after he had been dismissed and had ceased to teach, and after a warrant having issued under it, the property of one of the trustees being actually distrained upon and detained, in order to make the amount, and only not sold, as it appears, because an action of replevin has been brought, which is still pending, it seems a singular proceeding in the teacher to take up the matter again

as if nothing had been done, and to make the award, as well as a claim for salary since the date of it, the subject of a new arbitration. It seems still more strange, that having obtained from the second set of arbitrators an award for a sum which includes the same £53 5s. that had been already awarded to him, he should procure from these latter arbitrators also a warrant to seize and sell the property of the trustees, in order to make the same £53 15s., which had been already distrained for under a warrant issued by the other arbitrators under the first award.

Such a proceeding could hardly have been contemplated by the legislature as possible, under a due application of the acts they had passed.

Some of the objections which the plaintiff has taken would more properly have been taken upon demurrer to the plea, or might have been made ground of moving for judgment for the plaintiff *non obstante veredicto*.

But we are to deal with the case as it comes before us. The form of words in which the plaintiff has traversed generally the first special plea of the defendants is sanctioned by the 128th clause of the Common Law Procedure Act, and puts in issue all facts essential to the support of the plea. One of these material statements is, that the defendants Burness and Hooper made such an award as is set out, and this it was incumbent on the defendants to prove; but the copy of the award, which they produced in proof of the original stated to have been lost, is wholly different in its tenor from that set out in the plea.

In order to make the defence under the second award and warrant bear more plainly and conclusively in their favour than it might seem to do, if it were set out as it really is, the defendants have in their plea represented the award to contain a great deal of which there is not a word to be found in it. Averments might have been made in the plea that might have served to introduce and make intelligible the short reference to a forward award, which is contained in the first part of that made in December last; but the defendants have taken upon themselves to set out an imaginary award, as will be seen by comparing the plea with the copy of the



award produced. It was not necessary for them to set out the whole of the award, if there were parts of it which had no bearing upon the defence they were setting up. The having omitted any thing, therefore, which is in the award would not have been necessarily a fatal variance. It is usual in case of such omissions to state that the arbitrators, among other things, awarded, &c.,—setting out only those parts that are material to the action or defence; and if portions are improperly left out which materially qualify those parts on which the party is proceeding, the other party takes advantage by setting out the parts omitted and demurring. But this is a totally different case. Here the defendants set forth an award as containing in itself various important matters, directly bearing upon the subject in question, and when they produce the award, not a word of the statements is found in it. This discrepancy shews that the award which the defendants produce is not that which they pleaded, or else it would be found to contain what they aver is contained in that which they rely upon as supporting their warrant. They have consequently not proved the award which they set out, and which the replication put in issue; for that produced cannot be the one described in the plea, and they proved no other.

The defendants failed, therefore, I think, in this respect, in maintaining their first plea. That the plea itself was open besides to various legal exceptions I have no doubt, though I have already intimated that some of them, if not all, should have been taken advantage of in another manner.

I understood it to be consented on the argument that we should look into the pleadings and award, and say on the whole whether we consider that the seizure of the goods under the proceeding set forth was legal. If that be the understanding on which the parties are before us, there are various other grounds, besides the one which I have stated, on which, in my opinion, the defence fails.

I dare say that the legislature intended that any contract between the trustees and the school teachers should be in writing. The language in the 17th section of 13 & 14 Vic., ch. 48, I think tends to shew that, when it says that the

teacher shall be entitled to be paid at the rate *mentioned in his agreement* with the trustees; but perhaps the intention is not so clearly expressed as to warrant us in holding that a verbal agreement with a teacher cannot be enforced by any of the remedies given by the statute, if it were not for the necessity at common law of executory agreements made by such corporate bodies being under their corporate seal, which necessity we have held in Quin's case (9 U. C. R. 130) to apply to agreements between trustees and school teachers; and indeed the 11th clause of 16 Vic., ch. 185, seems to contemplate that the contracts with school teachers shall be in writing.

Again, by the 10th section of the act, the trustees are made a corporation. They are therefore to be dealt with by courts of law in their corporate capacity only, unless when the statutes direct or allow them to be proceeded against as individuals, for any thing done or omitted by them as trustees.

The 12th section, sub-section 16, does provide that in case the trustees or any of them, *shall wilfully neglect or refuse* to execute their corporate powers *for the fulfilment* of any contract or agreement made by them, he or they shall be personally responsible for the fulfilment of such contract or agreement. But to warrant a proceeding against them, or any of them, as personally liable under that clause, it is, I think, necessary, as has been contended, that it should be averred and proved that they have in some particular (which should be specified), wilfully neglected or refused to execute their corporate powers for the fulfilment of a contract.

Nothing that comes clearly and precisely under that category is shewn. If the evidence makes out such a case, which I should hesitate to affirm, still such a wilful neglect or refusal is not alleged in the award as the ground-work of the jurisdiction to make the trustees personally liable. The merely not having paid a school teacher an arrear of salary, even where there is no question about dismissal, does not necessarily imply a wilful neglect or refusal to act on the part of the trustees, as I think the 12th section, sub-section 7, and other parts of the statute, will shew; but if this were

otherwise, it would be still necessary to lay expressly that ground for charging a personal liability.

Then the effect of the 17th section of the act 13 & 14 Vic., ch. 48, has, I think, been misconceived. The case of the teacher was that he had been dismissed, but that he was nevertheless entitled to his salary, and for a period beyond his service. Supposing that to be so for a moment, and admitting that at any rate, if he claimed it and the trustees denied it, this became a matter in difference which could be referred under the 17th clause, in which case it would rest with the arbitrators to determine;—still it is to be considered, that, when the first arbitrators awarded £50 as due to him upon or in consequence of his dismissal, the not paying the teacher that sum awarded was not strictly a failure to pay him his salary at the rate mentioned in his agreement, *according to their engagement with him, and after the expiration of the period of his agreement.* It was the not paying him a sum which was awarded by the arbitrators as compensation for his dismissal; and if they failed to pay that sum after the dismissal, and after the award, he could not on that account claim to have his salary run as if it were a case of withholding his stipulated salary, after *the expiration of the period of his agreement*; for his relation as teacher did not come to an end from the expiration of the time for which he was hired, but was interrupted by his dismissal within that period. And if there were none of these objections, yet after the dispute between the teacher and the trustees had been referred to arbitration, and an award made, that surely concluded the matter in difference; and the simply not fulfilling that award could not constitute a new matter in difference within the meaning of the act authorising a second reference to arbitration under the 17th clause.

The defendants would not be precluded from urging these objections in the proper manner by the provision in this statute, that the award shall be final; for that can mean no more than that an award, made upon a matter which is subjected to such a jurisdiction under the act, shall be final as regards the merits. Whether it was a case for reference under the 17th clause must always be open to be inquired



into, though not perhaps under a plea simply denying the award, but rather upon demurrer, or upon a plea in answer to the award, setting out the facts which would shew the proceeding illegal.

For the reasons I have before given, I think the defence failed for want of proof of the award set out, and that on that account a verdict should be entered for the plaintiff; and because the averment of an agreement with the school teacher required proof of a written agreement to support it; and also on the other grounds, if we are at liberty on this record to notice them.

Then it remains to be considered, whether the plaintiff or the defendants should succeed upon the demurrer to the second plea.

First, as regards the defendants who signed the warrant. They have pleaded in their plea, which is demurred to, that the acts charged against them were judicial acts, done by them as arbitrators under the Common School Acts, in good faith, and within their jurisdiction.

Our first Replevin Act, 14 & 15 Vic., ch. 64, provides, that replevin may be brought, whenever trespass or trover will lie for taking or converting goods.

This is qualified by the enactment in 18 Vic., ch. 118, that goods in the custody of the sheriff, under any process from a court of record, shall not be replevied. These goods were not in such custody. The question therefore is whether trespass would lie against the two arbitrators, notwithstanding any thing stated in the second plea.

It would not lie, I think, if the arbitrators had jurisdiction in the matter in which they acted, because then their making the award in favour of the teacher in a matter within their jurisdiction would be a legal act, and the issuing of the warrant to enforce the award is enjoined upon them by the legislature. If they took an erroneous view of the merits, and mistook the law, or came to an unsound conclusion upon the evidence, when the matter referred to them was within their jurisdiction, that would not make them trespassers. They would be protected, as justices would be protected who are authorised by statute to determine differences between masters



and servants. The case of *Lowther v. The Earl of Radnor et al.* (8 East 113) is a case of that kind.

Then is the second plea put in by the arbitrators sufficient in substance as a defence of that nature ; that is, is it sufficient in substance, within the spirit of the 99th clause of the Common Law Procedure Act ? It is wanting in those details which were formerly indispensable in pleas of justification under a judgment or execution ; but we are now to give judgment according as the very right of the cause, and matter in law shall appear to us ; that is, as they shall appear in the plea ; without regarding any imperfection, omission, or defect in form. Those are the words, however, that were used in the old statutes 27 Eliz., ch. 5, and 4 Anne ch. 16, on which the distinction so long rested between general and special demurrers ; and we have therefore to consider whether, before the passing of the Common Law Procedure Act, this plea would have been sufficient on general demurrer. Before the act, a plea so general in its terms, intended to be a justification under a legal proceeding, was never put in, I imagine ; but that alone would not be decisive. *Moravia v. Sloper et al.* (Willes 30), and *Mure v. Kaye* (4 Taunt. 34), are cases in which the want of sufficient facts being set out in a plea of justification of this nature to enable the court to judge whether the court or officer had jurisdiction, was held bad on general demurrer ; and for the protection of parties against the illegal exercise of powers specially conferred by parliament, it has been held generally necessary, in point of substance, to set out whatever is necessary for giving jurisdiction.

No doubt the plaintiff here might, by replication to this plea, have stated such facts as to shew that the arbitrators had exceeded their jurisdiction, and that would have been a safer course than demurring, since the late act.

But they have demurred instead ; and the question is, whether the defendants' plea does not disclose sufficient to make it a good plea in substance ; that is, upon general demurrer, now that matters of form are no longer to be regarded. The plea does allege that they were *duly appointed* to act as arbitrators under the Common School

Acts, upon a matter of difference between the then trustees, &c., to wit, this plaintiff and William Kennedy and John Murray, on the one side, and Naylor, the teacher, on the other, in regard to the teacher's salary then due to him, and other matters in dispute between them ; and that in disposing of the matters so referred, they were acting within their jurisdiction.

Although the statement is very short and simple, I think it does state all that is necessary to enable us to see that if the plea is true the defendants must have had jurisdiction under the act, except in one very important particular ; and that is, that the plea alleges nothing which could authorize the arbitrators to make an award against the trustees as personally liable, and serve a warrant against the private property. The plea indeed states nothing that would give us certainly to understand that the arbitrators had dealt with the trustees otherwise than as a corporation, which is what the statute 16 Vic., ch. 185, sec. 15, seems to intend. If there were circumstances which authorized the arbitrators to entertain and act upon a complaint against the trustees in their personal capacity, they should have been stated, as they would form the foundation of the right to act against the trustees in their private capacity, and not as a corporation. Nothing of this kind appears in the plea, and in that respect I think it is insufficient.

Then as to the plea of justification pleaded, secondly, by the other defendant, Dixon, the bailiff who executed the warrant: this warrant not being the mandate of a court of record, the want of jurisdiction would be as fatal to the defence of the bailiff who acted under it, as of the arbitrators who made it. This I take now to be clearly settled. I refer to the cases of the *Queen v. Burnaby* (2 Ld. Raym. 900); *Margate Pier Co. v. Hannam et al.* (3 B. & Al. 266); and *Morrell v. Martin* (3 M. & Gr. 580). There have been decisions or dicta to the contrary, but they are now overruled. It was therefore as essential to Dixon's defence under the warrant, as it was to the defence of the arbitrators who caused the seizure of this plaintiff's goods by making that warrant, that we should see on the face of the plea

something sufficient, *primâ facie* at least, to give jurisdiction to award money to be paid by the trustees individually in their private capacity—that is out of their own means—and not merely to make an award against them as a corporate body, which they are under the statutes, having a corporate name expressly given to them, and being therefore only liable personally when they have “wilfully refused or neglected to exercise their corporate powers.”

On this ground I think the second plea of defendant Dixon is insufficient.

And for the reasons I have given, my opinion is that a verdict should be entered for the plaintiff with 10s. damages on the issues in fact, and judgment be given for the plaintiff on demurrer to their second plea.

I will add, as bearing upon the merits of the case, that although it is true (under certain restrictions, however,) that an award may be bad in part and yet supported as to the remainder, yet that when a special jurisdiction is created, as in this case, and in the case of justices authorised to make a conviction, when goods are seized to make a sum directed to be levied under a warrant made by them, and if as to part of the sum directed to be made the adjudication was illegal, the warrant as regards the whole sum must be held to be illegal, and the seizure under it cannot be maintained even as to *that part which was lawful* (11 A. & E. 39 ; 1 A. & E. 264.)

The arbitrators had surely no authority to order all to be levied which they did order, for a warrant had already issued by the other arbitrators against the goods of the then trustees for the sum which they awarded, and a seizure had been made under it. It was not competent in these last arbitrators to treat the claim under that award as a matter in difference, and direct it by their warrant to be made a second time. Their including that £53 in their warrant made it in my opinion wholly illegal, but I do not determine the case upon that ground.

BURNS, J.—The defendants in this case justify themselves under an award made by the two of them, the other being their

bailiff, which they contend is in accordance with the provisions of the Common School Acts, under which it is declared the award shall be final, and that no action of replevin will lie to try the validity of the award.

*First.* As to the right of the plaintiff to maintain replevin, and thus try the validity of the award. It is quite a mistake to suppose, because the legislature has said the award shall be final, that parties are precluded from asking the courts to say whether such a tribunal as that of arbitrators constituted under these or any other acts, has acted legally or not. The meaning is that the merits of the matter in question or dispute between the principal parties, when adjudicated upon by a tribunal of that description, shall be set at rest, and cannot again be opened or questioned; but it cannot extend to preclude an inquiry whether that tribunal has or has not acted according to law. The legislature never intended that arbitrators, when once appointed, should give themselves jurisdiction to say and do any thing they pleased. The jurisdiction mentioned in the 17th section of 13 & 14 Vic., ch. 48, is this: "*In case of any difference between trustees and a teacher in regard to his salary, the sum due to him, or any other matter in dispute between them.*" Certain duties are imposed upon trustees, and persons chosen as such are compelled to serve in that capacity under certain penalties. Rights are conferred upon the teachers in the same way. If it were not open to the courts of law in some way to examine whether such a tribunal as that of arbitrators (a most useful one when properly exercised, and when kept within the jurisdiction intended for it) had conducted itself in a legal manner respecting the legal rights of all parties before it, it would soon be of no benefit to the community. No power is given to review the decision of the arbitrators, and no authority is given to examine into their conduct and motives; and therefore, so long as they keep themselves to the law, and do not interfere with the legal rights of others, they are free to form any judgment they please, and it is final. When they do interfere with the legal rights of parties, then the remedy is by action against them for exceeding their jurisdiction, and one of those actions may be replevin—Allen v.



Sharp (2 Ex. 352), George v. Chambers (11 M. & W. 149), and Jones v. Johnson and Morgan (5 Ex. 862). The defendants' counsel relied upon the statute 18 Vic., ch. 118, but that act was only meant to explain that the 14 & 15 Vic., ch. 64, was not creating a remedy by replevin to take goods out of the hands of the sheriff, or other officer, who had seized and taken them under process issued out of the courts of record. If these arbitrators had no jurisdiction to make the award they have done, no one can doubt that an action of trespass would lie against them, as well as against the bailiff whom they have set in motion.

*Secondly.* The next question is, whether the defendants had jurisdiction to make the plaintiff personally responsible for the payment of the salary to the teacher; and whether the facts should not appear upon their award, why the trustees have been adjudged to pay personally the amount awarded. The 4th sub-section of section 6 of the act of 1848 declares that it shall be the duty of the electors, at the annual meeting, to decide upon the manner in which the salary of the teacher or teachers, and all the expenses connected with the operation of the school or schools, shall be provided for. Sub-section 5 of section 12 makes it the duty of the trustees to contract with and employ all teachers, and determine the amount of their salaries. The 7th sub-section makes it their duty to provide for the salaries of teachers, and all other expenses of the school, in such manner as may be desired by a majority of the freeholders or householders at the annual school meeting; and to employ all lawful means, as provided for by the act, to collect the sum or sums required; and if such sums be insufficient, then the trustees have authority to assess and collect an additional rate. For the purpose of collecting these rates proper lists are to be made out, and the proper sums annexed, and the trustees may use their own authority for collecting these rates, or apply to the municipality of the township to enforce payment.—Sub-sections 8 & 9. The 11th sub-section gives the trustees authority to sue for and recover, *by their name of office*, the amounts of school rates or subscriptions due from persons residing without the limits of their school section, and making default in payment. All these powers

are to be exercised by the trustees as a corporation on behalf of the school section, and of course the voice of the majority of trustees is the act of the corporation. The 16th sub-section enacts, that it shall be the duty of the trustees "to exercise all the corporate powers, vested in them by this act, for the fulfilment of any contract or agreement made by them; and in case any of the trustees shall wilfully neglect or refuse to exercise such powers, he or they shall be personally responsible for the fulfilment of such contract or agreement."

Now it will be seen from this language, that it is only such of the trustees as wilfully neglect or refuse to perform their duty that are made personally responsible for the fulfilment of the contract, and they are only made responsible for wilful neglect or refusal, not such as may happen or arise from matters and circumstances over which they have no control, or cannot guard against. A teacher may no doubt contract with the trustees as such, personally on their part, without reference to their being a corporation, and in such case they would be personally liable to carry out the contract; but then the teacher must resort to and take the ordinary remedies to enforce his contract that any other person would do upon any other contract; he can only invoke the extraordinary powers given for his protection by the 17th section of the act of 1848, and the 15th section of the act of 1853, when he admits that his contract with the trustees is of such a character as that the School Acts apply to it, and that it is made under them. It is a very grave question to be submitted to arbitrators, to say whether trustees have or not performed or exercised the corporate powers conferred upon them, and in what respect the omission to do so has rendered the trustees personally responsible. The 16th sub-section, I suppose, was intended for the mutual benefit of the rate-payers of the section as a body, and the teacher employed by the trustees; but it is certainly a serious matter to the trustees, who are bound to take the office under penalties, if their personal liability is to be determined by arbitrators chosen in the manner directed by the act.

We have already determined that the teacher cannot maintain an action against the trustees as a corporation for

his salary, but must take the remedy under the 17th section of the act of 1848, and 15th section of the act of 1853.— See *Tiernan v. School Trustees of Nepean* (14 U. C. R. 15). That case, however, does not touch the point, whether the personal liability of the trustees is or may be a matter in dispute between the teacher and the trustees, within the meaning of the 17th section. If the contract originally made was with the trustees personally, and not as a corporation, and they were looked to personally by the teacher on the contract, I apprehend it would not be in the power of the trustees, upon a mere assertion of their's that they were contracting as a corporation, to invoke the interposition of an arbitration to settle the difference between them on that point, and so oust the jurisdiction of the courts of law to determine the question.

Then, on the other hand, may not the trustees say, if they are to be held personally liable, it must be upon what the legislature has declared shall constitute their liability, and not merely upon what view arbitrators may determine the point.

I do not feel it necessary to say, as an abstract question, whether arbitrators would or would not have the power of determining the question of personal liability on a dispute between the teacher and the trustees. Nothing can be drawn from the expression in the 15th section of the act of 1853, that the person authorised to execute the warrant shall have the same powers, by seizure and sale of the property of the party or corporation, as any bailiff of a Division Court has, which can militate against or can be construed in favour of either view. If the award happened to be against the teacher, then he would be the party against whom the warrant would operate if anything was awarded against him, or if the matter in dispute clearly was something personal with the trustees, and had nothing whatever to do with them in their corporate capacity, then they, or whichever of them it might happen to be, would be the party.

It is stated that there is no necessity that an award should contain any introductory recitals to shew that the arbitrator had jurisdiction. Mr. Russell, in his work upon Awards, page 251, says, "But though such recitals are not essential,



it is advisable that they should be made, in order in many cases to explain the award, and that they who peruse it may see on the face of the instrument that the arbitrator had authority to award as he has done, and that he has fully performed his duty." The award in the present case does shew the ground upon which the arbitrators professed to act, and that ground is very far from being a failure to exercise the corporate powers vested in the trustees by the act for the fulfilment of the agreement. The ground mentioned as the jurisdiction, why the arbitrators in this case have awarded to the teacher the sum of £37 5s. 4d., is that under the statute, because the arrears of his salary awarded to him by a former award had not been paid, he was entitled to be paid this sum. The former award is recited, and adopted by these defendants as conclusive, both upon the teacher and the trustees; and it is this, that a dispute had arisen about the hiring and the amount due, which having been referred to other arbitrators than the defendants, was decided by them, that the teacher was engaged for a period of nine months from the 11th of March, 1856, at a salary of £100 per annum: that such school teacher was improperly dismissed by the trustees; and they had awarded to the teacher a certain sum of money.

These defendants evidently considered that under the 17th section of the act of 1848, which, for the protection of the teacher, enacts, "that any teacher shall be entitled to be paid at the same rate mentioned in his agreement with the trustees, even after the expiration of the period of his agreement, until the trustees shall have paid him the whole of his salary as teacher of the school according to their engagement with him," he was entitled to his salary at the same rate until he should be finally paid. Now, the first question is, whether a dispute arising between the teacher and the trustees, about whether he has been engaged for a particular period or not, and has been dismissed, and a sum of money which has been awarded to him remaining unpaid, entitles the teacher to claim an amount equivalent to what the trustees agreed to give, until he be paid the amount of the award. I am of opinion such never was intended by the provision] in the act. The pro-



tection to the teacher was to ensure punctuality on the part of the trustees in payment of the salary; and if the trustees desired that there should be an end of his engagement, they should pay him, otherwise the teacher may be considered as entitled to the same amount of salary until they do pay him. Here it appears that the trustees had dismissed the teacher—for what is not stated—and on that dismissal an arbitration was had as to what was due him. An end was put to the contract by the dismissal of the teacher, and if he were improperly dismissed, as the first set of arbitrators say he was, and as the second set (these defendants) adopt, then it was the duty of the first arbitrators to compensate him for that improper dismissal; but certainly these defendants had no right or jurisdiction to consider that his engagement still subsisted, and that they could award a further sum to him as if his salary was still going on.

If what the defendants contend for were law, then, in case the litigation commenced on that first award were continued on for a year or two longer, not only would the teacher be entitled to claim his salary from the time of their award up till the time it should be paid, but also they might claim an arbitration to enforce the payment of it from an entirely new board of trustees. It is quite plain to me the legislature never intended protection to teachers to so absurd an extent as that.

Then the second consideration would be, supposing that the teacher was entitled to compensation beyond the first award, because it remained unpaid, would the trustees be personally responsible for it? I am unable to see any principle upon which such a proposition can be rested. If there had in the meantime been a change of trustees, I do not suppose it could have been seriously argued by any arbitrator, unless indeed he was ignorant of the first principles of right and wrong, that such new trustees would be personally liable; and I do not suppose any one would seriously think of attempting to force payment from the retiring trustees by means of the Arbitration Clause. I suppose then these defendants have thought that as the trustees improperly dismissed the teacher, they had thereby rendered

themselves personally responsible for all sums that the teacher might be considered as entitled to claim. As I have already remarked, if the contract in this case was made with the trustees, irrespective of their corporate capacity, then the teacher must resort to his remedy, as other persons would do on similar contracts, and could not invoke the summary remedy given by the act; and if his contract with them is in their corporate character, then the question whether they be personally liable must, I think, turn upon the fact whether they have been guilty of wilful neglect or refusal to exercise the powers given them to fulfil the contract. We must assume that the teacher made his contract with the trustees under the act, from the fact of his proceeding under it to enforce what he considered to be his rights. I do not think the trustees, after having made a contract in their corporate capacity as such, are liable personally, except under the act.

The defendants set up an award, which, by their own shewing, they had no jurisdiction to make, and therefore the defendants must fail.

I do not desire to be understood as saying any thing to interfere with the proper and wholesome exercise of referring disputes which may arise between the trustees and their teacher to a forum speedy in its action, and upon the spot, to decide upon evidence which would neither be proper or expedient, in some cases, to have advanced in a public court of justice.

I have treated the case so far upon the nature of the award set out in the plea, and as to its validity when compared with the statutes. On comparing the copy of the award used at the trial, and which was established to the satisfaction of the jury to be correct, (the original having been lost,) with the award set out in the plea, the defendants do not support the plea at all. The award produced is altogether different from the award pleaded; and consequently, the award being denied, the defendants must fail. The plea cannot be amended by setting up the award as produced, so as to afford a defence; for I think the award produced equally bad with the one pleaded, for the reasons

I have already stated. It would be bad; however, for another reason. These defendants not only have stated that they adopt the former award of the former arbitrators as being conclusive, but they have taken up the sum so awarded, and have added the further sum these defendants find in the teacher's favour to the other, and then award the whole against the plaintiff and other trustees, thus making two awards against them for the same sum of money; and they have actually issued their warrant to levy the whole sum, although the other arbitrators have issued a warrant also on the first award, to enforce payment of the same sum included in the second award. To set up the award which was produced would only invite pleadings, which would, in the end, be raising the question whether it be valid, and therefore no object can be obtained by allowing any amendments.

I think the rule should be made absolute for entering the verdict for the plaintiff.

MCLEAN, J., concurred.

Rule absolute.

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### CAMPBELL V. THE GREAT WESTERN RAILWAY CO.

*Injury to cattle wrongfully on Railway - Liability therefor.*

Where cattle have wrongfully got upon a railroad through the negligence of the owner, the company are still obliged to use ordinary care and caution to avoid a collision; and in this case, where horses had escaped upon the track through a gate at a farm crossing, which the owner had left open, but although they were seen by the engineer the speed was not slackened, and no precaution taken except sounding the whistle, the company were held liable.

This was an action for negligently killing four colts of the plaintiff, by running over them with defendants' locomotive on the line of their railway.

The declaration, in the first count, contained an averment that it was the duty of the defendants to keep up sufficient fences on the line of their railway: that they did not keep up sufficient fences; and that in consequence the plaintiff's colts strayed from his field upon the line of railway, and were killed through the negligence of defendants in conducting their railway train.

In a second count the plaintiff stated that his colts strayed from his farm upon the railway, and while they were so upon

the railway they were killed by the negligence of defendants in driving their locomotive; &c.

In a third count the plaintiff charged that his colts were on his farm adjacent to defendants' railway, and that by reason of the insufficiency of the fences along the line of railway, (not saying who was bound to keep the fences in repair,) the colts escaped from his farm upon the railway; and that while they were so upon the railway, the locomotive engine of the defendants passed along the railway, and the plaintiff's colts were thereby killed—not charging any negligence or improper conduct in the defendants.

Pleas—1st. Not guilty "by statute."

2nd. That the colts did not belong to the plaintiff.

At the trial, at Toronto, before *Robinson, C. J.*, it appeared that the plaintiff lived on a farm between Toronto and Hamilton, through which the defendants' railway passed.

About mid-day the defendant's train was going down from Hamilton to Toronto. As it came up to the plaintiff's farm, it was observed that some cows were upon the railway track, and the train was stopped until a man got off and drove them away. As they were moving off again they saw the plaintiff's colts on the railway track in front, at the distance of about 250 yards. The whistle was sounded, and the colts ran on before the train till they got to a concession line, where the cattle-guard at that point stopped them. No signal was given to apply the break, and from the time the train was started the speed continued to increase, notwithstanding these colts were just before them, and notwithstanding the uncertainty there must be whether they would get out of the way or not. The whole four were killed.

There was a crossing over the track from one part of the plaintiff's farm to the other, and gates at each side of the track in the railway fence, which gates opened into the plaintiff's land from the track. During the winter the snow was sometimes so high against the fence that cattle could get over, and it appeared that the gates were not properly kept shut. The neighbours were in the habit of using the plaintiff's farm road in the winter, as a short cut. It led partly through his fields and partly through woodland, and they



were not always careful to shut the gates, During the winter (this happened in February) the snow often fell in such quantities as to make it impossible to open and shut the gates without clearing it away ; and there was some evidence that the plaintiff himself, in order to save the trouble of frequently clearing away the snow, had some time before taken one or both of the gates off the hinges, and laid them on one side against the fence.

Whether the dates or either of them, were in that state on the day in question was not proved, nor from which side of the track, nor in what manner, the colts got upon the track. The plaintiff usually kept them in the stable or yard at night and let them out on the farm in the morning, and they had been so let out in the yard that morning some hours before they were run over.

It was to be inferred from the evidence that the gates were not closed on that day before or at the time of the accident, and that one or both of them were off the hinges at the time.

The next day after, two men in the service of the railway company came and cleared away the snow from the gates, and hung them properly.

The defendants called no witnesses.

The learned Chief Justices told the jury, that so long as the defendants used ordinary care in driving their train, they could not be held liable for accidents of this nature that might occur, unless they were themselves clearly in fault in omitting some duty thrown upon them by law, which led to the animals escaping upon the track. But that, even in cases in which the horses or cattle are wrongfully upon the road—that is, improperly allowed by the proprietor to run at large—still the company were not at liberty to go recklessly forward and hunt them down, and were not relieved from the obligation to use reasonable care and caution in order to avoid a collision.

The jury gave the plaintiff a verdict for £60.

*Irving* obtained a rule *nisi* for a new trial without costs, on the following grounds ; that the verdict was against law and evidence, and for misdirection, in this, that the jury were told that, although it might have been negligence on

the part of the plaintiff to have taken the gate off the hinges, still it was the duty of the defendants' servants to have stopped the train; and that, if they could have done so, and have driven the horses off the railway, the plaintiff was entitled to recover; whereas the learned Chief Justice should have directed the jury, that if the accident was in part occasioned by the misconduct of the plaintiff, in doing an act from which nothing but that which did occur could have been anticipated, the defendants would not be responsible.

The learned Chief Justice in his charge did not give sufficient weight to the fact that the horses were illegally on the railway track, and got there only by the plaintiff's disregard of the law. In *Dowall et. al. v. The General Steam Navigation Company* 5 E. & B. 195, an action for running down the plaintiff's ship, it was held that by not shewing the statutory lights she had contributed to the accident, and could not recover. [BURNS, J.—Suppose she had half a dozen other lights, and still the other vessel had run her down, could the plaintiff have recovered?] Probably not. [BURNS, J.—But even then he would have been violating the law. ROBINSON, C. J.—Suppose an act had been passed forbidding cattle to run at large in the street, would that authorise any one wilfully to run down a cow there?] No: but the case of a railway is different. There the place is certain, and it is clear that if any accident happens it must be in that place: It is reasonable, therefore, to require persons at their own risk to keep off it. [ROBINSON, C. J.—Suppose then a human being were there, could the defendants legally run over him?] No: that would be murder. [ROBINSON, C. J.—Still your argument is that being on the road illegally excuses all consequences.]

The distinction between this case and the well-known case of *Davies v. Mann*, 10 M. & W. 546, is this, that there, when the plaintiff put his donkey in the road, he could not tell that a carriage would come in that spot. Here it was a positive certainty that a train must pass over the very place where the colts were. [ROBINSON, C. J.—Then suppose the owner of the colts had been standing by the train when it was about to start, and had asked the engineer to wait until he had

driven them off the track, your argument must be that they would still have been justified in going on, and committing the injury complained of.] If Railway trains are obliged in all cases to stop, to relieve persons from the consequence of their own negligence, the result would be most inconvenient. Much time would be lost; connexions with other trains be missed; and the defendants would perhaps be liable to their passengers for the delay occasioned. At all events it is only in cases of gross negligence that defendants should be made liable, and here the evidence shews that the accident was not wilfully occasioned. The whistle was sounded, and the engineer's impression was that the colts would probably leave the track before the train came upon them. It should have been left to the jury to say whether the defendants by reasonable care could have avoided the collision. *Caswell v. Worth* 5 E. & B. 849; *Ilott v. Wilkes* 3 B. & Al. 304.

*Connor, Q. C., contra.* The railway company were not justified in using no care because the horses were illegally on the highway. A man is not justified in shooting a horse trespassing in his field, even if he should see it wilfully driven in to destroy a valuable crop of wheat. There is no distinction in fact between this case and *Davis v. Mann*, referred to on the other side. *Dowell v. The General Steam Navigation Company*, also quoted for the defendants, shews that the plaintiff's negligence, to prevent his recovery, must put matters in such a position that the accident cannot be avoided; and that case differs from this, because there the plaintiffs were the *direct* cause of their own misfortune. *Butterfield v. Forrester*, 11 East 60, is a leading authority on the subject, quoted in all subsequent cases, and *Bridge v. The Grand Junction Railway Co.* 3 M. & W., 244, explains the doctrine as to the effect of plaintiff's negligence, very satisfactorily. *Renaud v. The Great Western Railway Co.*, 12 U. C. R. 408; *Sharrod v. London and North Western Railway Co.*, 4 Ex. 580. The result of all the cases seems to be, that the negligence of the plaintiff, to defeat the action, must be negligence *at the time of the accident*, not original negligence which afterwards led to it. [ROBINSON, C. J.—Suppose a man lies down on the track, and the train wilfully

goes on, and does not kill but only wounds him, would an action lie?] That case is put in *Davies v. Mann* as to a highway. Here the only distinction is that the train must go on that track, but that does not alter the law, and if the company in such a case use no care, they are liable. *Brownell v. Flagler*, 5 Hill, 282, is an American authority to shew that no matter how much the plaintiff is to blame, if the defendant has been guilty of an intentional wrong he is liable for it. [ROBINSON, C. J.—You will find that the American decisions on the subject are not uniform, but that many of them take ground more in favour of the railway companies than is upheld in England, holding that they are entitled to their track, and may use it regardless of any one; and our own act of last session seems to have nearly that effect.] (a)

ROBINSON, C. J.—The statute 14 & 15 Vic., ch. 51, sec. 13, sub-sec. 1, affords a strong argument that the legislature, when they passed that act, did not understand or intend that the railway companies to which the provisions of that statute were to apply, were to be relieved from the necessity of making use of ordinary care to avoid injury to the animals of others, which they might find upon their railway, under circumstances implying that they were there by the fault of their owner. The late statute 20 Vic., ch., 12, sec. 16, applies only to cattle escaping to a public highway, and going from thence upon a railway. If the occurrence which has given rise to this action had happened since that act was passed, the provisions would still not have applied. It will be for the legislature to consider whether it would, on the whole, be better to place farm-crossings on the same footing in this respect as public highways, which intersect the railways; but till that has been done, the principles and maxims of the Common Law must prevail in such cases as in others.

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(a) See *Clark v. Syracuse and Utica Railway Co.* 11 Barb. 112; *Tonawanda Railway Co. v. Munger* 5 Denio 255; *Spencer v. Utica and Schenectady R. R. Co.* 5 Barb. 337; *Brown v. Maxwell* 6 Hill 592; *Talmadge v. The Rensselaer and Saratoga Railway Co.* 13 Barb. 493; *Trow v. Vermont Central Railway Co.* 24 Verm. Rep. 487; *Brooks v. New York and Erie Railway Co.* 13 Barb. 594.



McLEAN, J.—It appeared to be admitted on the argument that the plaintiff caused the gates placed by the defendants at the railway crossing on his farm to be taken up, in consequence of their being obstructed by the depth of snow; and the question is, whether the escape, in consequence of this act of the plaintiff, of his colts from his farm, to the railway, constitutes such an act of negligence on his part as must under the circumstances of this case prevent his recovery. I am clearly of opinion that no such negligence is established as to bar the plaintiff's recovery. It may have been an imprudent act to take the gates off the hinges, but if, as stated by one of the witnesses, the snow was in fact so drifted against the gates that cattle could pass over them, they could form but a very indifferent fence to prevent cattle from getting on the railway; but though imprudent, the removal was not necessarily an act of negligence such as to lead to the killing of the colts. The plaintiff could not anticipate that the colts would leave his barn yard, where they were usually kept during the day time, and stray on to the railway; nor could he anticipate, if they did, that they would be killed by defendants' locomotive in open day, when they were plainly visible at a considerable distance, and when it was quite practicable to stop the engine or slacken its speed, so as to prevent any collision.

The language of Lord *Ellenborough* in giving judgment in the case of *Butterfield v. Forrester* (11 East 60) bears very strongly on this case. He says: "A party is not to cast himself upon any obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered the wrong side of the road, that would not authorize another to ride purposely against them. One person being in fault will not dispense with another's using ordinary care for himself." Now if this were an action by defendants for negligence on the part of the plaintiff, by reason of which his colts escaped from his premises to the line of railway, and the locomotive and cars were thrown off the track by running against them or over them, could they recover on the evidence, shew-

ing as it does a culpable want of care on the part of the defendants' servants ?

The plaintiff's fault, in allowing the gate of the crossing to be removed, could not dispense with the defendants using ordinary and proper care to avoid a collision, or running over the colts.

The general rule of law respecting negligence is, that although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequence of the defendants' negligence, he is entitled to recover. (a) Now the plaintiff could do nothing in this case to prevent the defendants' locomotive from running over or killing his colts, at the time the act was committed, and there was no negligence on his part in causing that act. The only negligence which could be imputed to him was in leaving the gates open, and that did not cause the defendants necessarily to kill his colts, if they could by due care have avoided doing so. The jury have found that the defendants did not exercise due care, and the evidence certainly supports the finding of the jury. I am therefore of opinion the rule must be discharged.

BURNS, J.—I do not see that any fault is to be found with the direction given by the learned Chief Justice to the jury. On the best consideration I can give to the evidence, I think it was a correct charge to give them. There is no doubt that the plaintiff's colts, however they may have got upon the railway track, were there as trespassers upon the defendants' property, but that fact would not authorise the defendants' servants to destroy them. Suppose the plaintiff to have been the cause of the gates being removed, so that the track of the railway was exposed to the plaintiff's fields and so the colts escaped to the railway track, yet in my opinion that would not disable the plaintiff from maintaining the action, unless that circumstance was the immediate cause of the accident.

In the case relied on by the defendants' counsel, *Dowell v. Steam Navigation Company* (5 E. & B. 195) Lord *Camp-*

(a) See *Davies v. Mann*, 10 M. & W. 546; *Dimes v. Petley*, 15 Q. B. 276; *Greenland v. Chaplin*, 5 Ex. 243; *Rigby v. Hewitt*, *Ib.* 240.

*bell*, in giving the judgment of the court, says: "In some cases there may have been negligence on the part of a plaintiff remotely connected with the accident; and in these cases the question arises, whether the defendant, by the exercise of ordinary care and skill might have avoided the accident, notwithstanding the negligence of the plaintiff, as in the often quoted *donkey* case. There, although without the negligence of the plaintiff the accident could not have happened, the negligence is not supposed to have contributed to the accident within the rule upon this subject; and if the accident might have been avoided by the exercise of ordinary care and skill on the part of the defendant, to his gross negligence it is entirely ascribed, he and he only proximately causing the loss."

Now if the defendants' servants had not seen the colts upon the track, then it could not be said they were proximate cause of the accident, in that sense which would give the plaintiff a cause of action; because the colts being wrongfully upon the defendants' property, and that property being acquired for the purpose of exercising a dangerous business, sanctioned by the legislature, the defendants are not bound to keep watches upon their own property to protect that of others, and the plaintiff, if such had been the case, could have maintained no action. The colts were seen quite in time to have avoided the accident, for the person in charge of the train had stopped it in order to drive off some other cattle; but they seem to have supposed the colts would themselves have run out of the way of the train, for the train, after been set in motion again, was driven faster and faster until it approached a cattle-guard, and the accident occurred there. The question, as it appears to me, then is a very simple one; and it is this, whether the defendants can be said to be the proximate cause of death, amounting to gross negligence, or not; and the question is not whether the plaintiff was the proximate cause by his negligence in allowing the gates to be open, so that the colts got upon the track, as the defendants contend for. In *Blyth v. Birmingham Water Works Company* (11 Ex. 781) negligence is defined by Baron *Alderson* to consist in the omitting to do something that a reasonable man would do, or the doing something that a reasonable man would not do. The defendants, in exercising a dangerous

calling, are not exempted from the rule established in *Davies v. Mann*, but the application of the rule will be made with reference to that calling, and the ordinary care and skill will be required which is usual in railway business, and no more. I see no reason for not applying to railway companies upon the principles I have stated, the same rule which would apply in other cases. It is stated that if the owner of a several fishery cut nets found in his water, he is liable for the act as a wrongful one. (Bac. Abr. "Trespass" E 2,) Applying this principle to this case, though the plaintiff's colts were wrongfully upon the defendants' track of the railway, yet when the defendants' servants saw them there, I think they were bound to exercise such kind of ordinary care and skill to have avoided the accident of killing them, as would be expected from reasonable persons in that description of business. In the present case the defendants have themselves furnished proof of what would be considered proper, for the train was stopped in order to drive off other cattle before the accident of which the plaintiff complains occurred. To be sure the defendants argue they did, in so acting, what they were not bound to do. I do not say they were bound to stop the train altogether in order to have got rid of the colts, but it is sufficient to say here that the evidence tends to establish a desire rather to run them down than to avoid them, and this I do not think they are at liberty to do.

Rule discharged.

### GRIFFIN V. THE GREAT WESTERN RAILWAY COMPANY.

*Action for negligence in conveying a horse—Proof of delivery to defendants—demurrer to evidence.*

Case against a railway company, for negligence in putting upon one of their carriages a mare, which it was alleged had been delivered to and received by them from the plaintiff, to be safely loaded and unloaded, and conveyed to A. *Plea*, denying the delivery to, and receipt by defendants' and issue thereon.

A witness for the plaintiff swore that he took the mare to the station, where a man assisted him to put her in a car, in doing which the accident happened, and the mare was then taken on to the train to A.

*Held*, that the proof was insufficient to sustain the issue, and that on demurrer to the evidence, judgment in the County Court was properly given for the defendants.

APPEAL from the County Court of the county of *Wentworth*. The declaration charged that the plaintiff caused to



be delivered to defendants, and defendants received from the plaintiff a mare, to be by them safely and securely loaded and unloaded, carried and conveyed from Hamilton to Suspension Bridge, for reward in that behalf: that thereupon it became defendants' duty safely and securely to load and unload, and to carry and deliver the said mare at Suspension Bridge for the plaintiff; yet defendants not regarding their duty, &c., so negligently and unskilfully conducted themselves in loading said mare, that by reason thereof she fell from the carriage on which she was being loaded, and was injured.

Plea—1. Not guilty. 2 That the plaintiff did not deliver to the defendants nor did the defendants receive from the plaintiff, a mare, to be safely and securely loaded and unloaded, carried and conveyed, as in the declaration alleged.

The plaintiff took issue on these pleas.

At the trial in the County Court, at the close of the plaintiff's case, *Irving*, for defendants, moved for a nonsuit, on the ground that there was no evidence of an agreement by defendants to carry for hire, as alleged in the declaration, and that there was no proof of the second issue.

The learned Judge ruled that there was not sufficient evidence of delivery and acceptance under the second issue. The plaintiff refused to take a nonsuit and defendants' counsel then demurred to the evidence. The demurrer was admitted, and the jury were directed to assess the damages conditionally, which they did at £20.

The following is a copy of the demurrer to the evidence. attached to the record in the cause :

“ Afterwards, on the seventh day of April, in the year of our Lord 1857, at the Court House, in the city of Hamilton, before Alexander Logie, Esquire, Judge of the County Court for the County of Wentworth, came the parties within mentioned, by their respective attorneys within mentioned, and a jury of the within county being summoned also came, who being sworn to try the matter in question between the said parties, the plaintiff shews in evidence to the jury aforesaid, to prove and maintain the issue, ‘that he caused to be delivered to the defendants, and that they then received from the plaintiff a certain mare, of great value, to be by them safely loaded and unloaded, carried and conveyed, in

and upon the carriages, on and by the railway, from Hamilton to Suspension Bridge, for certain reasonable reward to the defendants in that behalf,' within joined upon his part, by Henry Bailey, a witness duly sworn in that behalf—That I took a horse on Saturday to the Great Western Railway for the plaintiff: it was in November. I went down twice; the first time we could not get the horse on the car; the second time I took the horse down a man took him and put him on the cars. He put a broad board from the platform to the cars, and while the mare was going up the board slipped, and the mare fell down between the cars and the platform. The mare got away, but was soon caught and put on board. They then got a board with slats nailed upon it, and put it against the iron-work to make steady. The mare was stiff. The car was then locked, and the mare was put on at Hamilton, and carried to Suspension Bridge. When the mare got off she was so stiff she could hardly walk: she was put in the stable.

"And the defendants say, that the matter aforesaid, in form aforesaid shewn in evidence by the plaintiff, is not sufficient in law to maintain the said issue on the part of the plaintiff, and that the defendants are not bound by law to answer the same, and this they are ready to verify; wherefore, for want of sufficient matter in that behalf to the said jury shewn in evidence, the defendants pray judgment, and that the jury aforesaid may be discharged from giving any verdict upon the said issue, and that the plaintiff may be debarred from maintaining his original action thereof against them.

"And the plaintiff, inasmuch as he has shewn in evidence to the jury aforesaid sufficient matter to maintain the said issue upon his part, and which he is ready to verify, and inasmuch as the defendants do not deny or in any manner answer the said matter, prays judgment, and his damages by reason of the premises within complained of, to be adjudged to him, &c.

"Whereupon it is told to the jurors aforesaid, that they shall enquire what damages the plaintiff hath sustained, as well by reason of the matter by him shewn in evidence as aforesaid, as for his costs of suit in this behalf, in case judgment should be given for the plaintiff upon the evidence aforesaid. And the jurors aforesaid, upon their oath aforesaid, thereupon say, that in case judgment shall be given for the plaintiff upon the evidence aforesaid, that they assess the damages of the plaintiff by him sustained, by reason of the matter by him shewn in evidence as aforesaid, over and above his costs of suit in this behalf, to twenty pounds, and for these

costs to forty shillings ; and thereupon the jury aforesaid, by the assent of the parties, are discharged from giving any further verdict upon the premises."

Upon the argument of the demurrer, in the court below, *Quiggin v. Duff*, 1 M. & W. 174 ; *Selway v. Holloway*, 1 Ld. Raym. 46 ; *Cobban v. Downe*, 5 Esp. 43 ; *Syms v. Chaplin*, 5 A. & E. 634, were cited for the defendants ; and *Marshall v. The York, &c., R. W. Co.*, 11 C. B. 655, and the cases there cited ; *Williams v. Cranston*, 2 Stark. 82 ; *Richards v. The London and Brighton R. W. Co.*, 7 C. B. 839, for the plaintiff.

Judgment was given in the court below, as follows :

*Logie, J.*—The question is simply whether or not there was a delivery by the plaintiff to the defendants of the mare, to be carried by them *modo et forma* as alleged in the declaration. It seems to me that the evidence given at the trial does not prove the issue. The plaintiff proved that the mare was taken to the station, and that when there a man (without stating what man, or that he was in any way connected with the company) took her and attempted to put her on the cars. While doing so the accident happened, which caused the injury to the animal. The defendants are not charged as common carriers simply, but upon a special agreement ; and that agreement should be proved. Even if it could be implied that there was a delivery to the defendants, from the fact that the mare was actually carried from Hamilton to the Suspension Bridge in one of the defendants' carriages, still there is no evidence to shew any delivery until the animal was actually in the defendants' carriage, and the accident is shewn to have occurred previously. Neither is it shewn, as alleged in the declaration, either that the defendants specially agreed to load and unload safely and securely, or that there is any implied duty on the part of the defendants to load or unload. It was held in the case of *Walker v. Jackson*, 10 M. & W. 161, that there is no common law or implied liability on the part of a carrier to load or unload, unless it is shewn to be the usage so to do. No such usage is shewn here, nor, as I have

already remarked, is it shewn that there was a delivery to any authorized agent of the company for the purposes and in the manner alleged in the declaration. The man who received the mare, for all that appears, may have been an agent of the plaintiff himself. The plaintiff as is frequently the case, may have hired the defendants' carriage to be loaded and unloaded by himself in such a manner as he might think fit, the company finding only the carriage itself and the propelling power. In *Cobban v. Downs* (5 Esp. 42), cited by *Irving*, Lord *Ellenborough* says "The delivery must be to an officer or person accredited on board the ship; it cannot be delivered to the crew at random." In *Howland v. Bethune* [13 U. C. R. 273] Mr. Justice *Burns*, in delivering judgment says: "We are not disposed to think that goods can be put on board a steamer, as was done in this case, without notice being in some way brought to the knowledge of some one whose duty it is to see after the goods, and that thereupon the owners must be held responsible for the safe carriage. In that case the defendants were held liable, upon its being shewn that at the time the goods were put on board a bill of lading was handed to the purser and received by him. The cases cited for the plaintiff are distinguishable from this case: they were actions brought for the loss of passengers' luggage. In such cases it is sufficient to shew that the luggage was put in the railway carriage, without shewing that it was put in the charge of any one, or brought to the knowledge of anyone connected with the company, the liability to carry safely passengers' luggage being somewhat similar to the liability of an innkeeper for the safe keeping of a guest's luggage brought to his inn. I think that the evidence tendered by the plaintiff does not prove the issues raised by the first and second pleas, and therefore that judgment should be for the defendants, upon the demurrer to evidence.

From this judgment the plaintiff appealed.

*Start* for the appellant, cited *Pozzi v. Shipton*, 8 A. & E. 974; *Williams v. Cranston*, 2 Stark. 82; *Richards v. The London and Brighton R. W. Co.*, 7 C. B. 839; *Gladwell v. Steggall* 8 Scott 60; *Harris v. Packwood*, 3 Taunt.



263 ; Story on Bailments, 533 ; Angell on Carriers, 130 ; Cent Com. 11. 598,

*Irving*, contra, cited Carr v. Lancashire, &c., R. W. Co., 7 Ex., 707 ; Cobban v. Downe, 5 Esp. 41 ; Selway v. Hol- loway, 1 Ld. Raym. 47 ; Quiggin v Duff, 1 M. & W. 174 ; Syms v. Chaplin, 5 A. & E. 634 ; Walker v. Jackson, 10 M. & W. 161.

ROBINSON, C. J., delivered the judgment of the court.

We think that the learned judge of the County Court took a reasonable and proper view of the question raised by the demurrer to the evidence, and that the appeal must be dismissed with costs.

It must be most important to the railway companies, if they are to be responsible for the safe transportation of live animals, and especially of horses, and they should be delivered to them in such a manner as shall give them an opportunity of having the terms of their undertaking settled and understood, and moreover of seeing that the horses are safely handed over to the charge of those servants of theirs whose business it is to attend to them.

For all that was proved in this case, the horse may never have been in possession of any one in the employment even of the company, until after the accident had occurred which occasioned the injury complained of.

If there had been any evidence even that the man who made the unsuccessful attempt to put the horse into the train, when he fell and was injured, was the same man who afterwards took him in and secured him, there would have been some evidence of a delivery to the defendants before the accident ; but upon that point there was no evidence, and the jury had nothing before them to shew that when the horse fell between the platform and the train, he was in charge of any one but the plaintiff's man or boy who brought him, and of some other man, who officiously assisted to lead him on board.

Appeal dismissed.

FERRIE ET AL., EXECUTRIX AND EXECUTOR OF ADAM FERRIE  
THE YOUNGER, V. THE GREAT WESTERN RAILWAY COMPANY.

Action by executors for death of testator caused by defendants' negligence—Measure of damages—Interrogatories proposed by defendants to plaintiffs after issue joined, as bearing upon the question of damages—How far allowable and when they should be proposed—Form and nature of such interrogatories—When and how objections should be taken.

In this case an application was made in Chambers, on the 5th of August, 1857, to administer interrogatories to the plaintiffs under the Common Law Procedure Act, 1856, section 176.

The action was brought under the statutes 10 & 11 Vic., ch. 6, against defendants for alleged negligence which occasioned the death of the testator.

The general issue was pleaded, and issue joined thereon on the 30th of June.

The testator was a practising attorney and barrister in the province, and was killed on the 12th of March, 1857, by an accident which occurred on the defendants' line of railway.

The plaintiffs claimed £15,000 damages as a compensation to his widow and child.

The defendants' solicitor made affidavit that he believed the defendants would derive material benefit if the plaintiffs should be required to answer certain interrogatories, which he desired to be allowed to propose; and he swore that the defendants had a good defence upon the merits, and that the discovery was not sought for the purpose of delay.

The interrogatories were as follow:

1. Asking for a copy of testator's will.
2. Inquiring what amount of assets the plaintiffs had realized, over and above all debts and liabilities due by the testator.
3. What property the plaintiffs have under their control as executors, not disposed of, and not included in the last interrogatory.
4. Who were legatees and devisees under the will, and the amounts which they would respectively derive under it.
5. Whether any of the legatees or devisees had any further expectations, reversions, or interest, not included in the

preceding interrogatories, and which might be derivable from any other real or personal estate in which the testator had an interest ; and to set them forth fully, and their value.

6. Whether Mrs. Ferrie (the widow) and the child with which she was pregnant, in case one should be born, had any interest, claim or rights, out of any property whatever, in right of the testator, and not included in the interrogatories, *or from any other source whatever*, and to state such interest.

The plaintiffs' attorney in opposition made affidavit, that on the 30th of June the defendants pleaded not guilty only. and issue was joined on the same day ; and he contended that the defendants should have made this application before pleading.

He objected also that the interrogatories were not such as should be allowed to be put.

The defendants desired the information, as bearing upon the question of damages.

ROBINSON. C. J.—As the information is not desired for the purpose of guiding the defendants in pleading, but only for the purpose of enabling the defendants to shew matter in reduction of damages, in case a verdict should pass against them, it can be of no consequence when the application is made.

I cannot say that I perceive clearly the object of all the inquiries. For instance, as the defendants do not dispute the fact of the plaintiffs being executors, I do not see why they should desire to see the will ; but if they do, and it would be proper for the court to grant it, the application I think should be made in the manner directed by the 175th clause—merely to compel a production for inspection.

The other interrogatories are probably intended to elicit answers, which may tend to shew that the widow is amply provided for under the will, and considering the condition of the estate. It appears to me that such information has not that bearing upon the merits that entitles the defendants to the discovery sought for, since the object of the law is not to afford or withhold compensation, in case of such accidents,

according to the necessities of the parties damnified by the negligence, but according to the loss really sustained. And I do not see any fair pretence for exacting from the plaintiffs that disclosure of all the affairs of the estate which such interrogatories call for.

I refer the defendants therefore to the court, if they desire to persist in the application. Costs of opposing the application to be costs in the cause.

*Irving*, in this term, obtained a rule to shew cause why the defendants should not have leave to administer the interrogatories.

*Patterson* shewed cause. *Becher*, Q. C., supported the rule, citing *Blake v. North Midland Railway Co.* 18 Q. B. 93; *James v. Barns*, 34 Eng. Rep. 434.

The interrogatories mentioned in this application are set forth in the judgment of *Burns*, J., and, it will be observed, are not precisely the same as those proposed in Chambers.

MCLEAN, J.—The interrogatories are drawn with a view to ascertain what the testator's will was; who the legatees and devisees are; the amount of assets over and above liabilities, and the amounts which the legatees and devisees will derive under it; whether any of the *legatees* or *devisees* have any further expectations or reversions, or other interest, which may be derivable from real or personal estate in which the testator had an interest, and their value, to be fully set out. Whether Mrs. Ferrie, the widow, or the child with which she is pregnant, in case one should be born, has any interest, claim or right, out of any property in right of the testator, not included in previous interrogatories, or from any other source whatever, and to state such interest.

This application was made in August last, in Chambers, before Sir *J. B. Robinson*, the Chief Justice of this court, but he declined making the order, considering that the information sought for has not that bearing upon the merits that entitles the defendants to the discovery, and not thinking that there was any fair pretence for exacting from the plaintiffs that disclosure of all the affairs of the estate which such



interrogatories call for. Leave was given at the same time to apply to this court, if they desired to persist in the application.

The motion being renewed in full court under the leave given, it becomes necessary to decide whether the application can properly be granted or not. The 176th section of the Common Law Procedure Act, 1856, provides, that in all causes in any of the superior courts, by order of the court or a judge, the plaintiff may with the declaration, and the defendant may with the plea, or either of them by leave of the court or a judge may at any other time, deliver to the opposite party or his attorney, provided such party would be liable to be called and examined as a witness upon such matter, interrogatories in writing upon *any* matter upon which discovery may be sought, and require such party within ten days to answer the questions in writing, by affidavit to be sworn and filed in the ordinary way; and any party omitting without just cause sufficiently to answer all questions as to which discovery may be sought, within ten days, or such extended time as the court or a judge shall allow, shall be deemed guilty of a contempt, and be liable to be proceeded against accordingly.

The 177th section provides the substance which must be stated in an affidavit, in order to support the application, the same in effect as contained in the affidavit of defendants' solicitor filed on behalf of the defendants.

The statute provides that in *all* causes, by order of the court or a judge, interrogatories may be put by either party to the other, upon *any* matter upon which *discovery may be sought*, so that, if there is any matter connected with this suit upon which the defendants desire to have a discovery, they have a right to apply, and a right to obtain an order. Of course the matter on which a discovery is sought must be such as in the opinion of the court or judge is material in the cause, otherwise the order would not be made necessary. The affidavits of defendants' solicitor does not shew how the facts with respect to which the defendants seek a discovery can be material in this cause, but it is stated that in the opinion of the deponent the defendants will receive material

benefit by the plaintiffs being required to answer certain interrogatories. Whether that benefit is to consist in a reduction in the amount of damages, or in a total discharge from any liability, can only be known by the tenor of the interrogatories: but in either case I apprehend that, if such benefit is reasonably expected to be derived from the plaintiffs' answers to the interrogatories, the defendants are entitled to have the interrogatories put for the purpose of eliciting such answers. Then with respect to the interrogatories which may or may not be put, I incline to think that the court or judge are not called upon to decide in the first instance as to their propriety, if the subject matter to which they point is material in the cause, and benefit is expected to arise to the party seeking discovery from the answers. If interrogatories are irrelevant or improper, the party called upon to answer may, as in the case of an ordinary witness, refuse to give any reply; and in such case, if any application were made to punish for a contempt under the 175th section of the act referred to, it would become the duty of the court or a judge to say whether any contempt had in fact been committed in refusing to answer.

In this case the interrogatories seem to be intended to elicit facts which shall go in mitigation of damages, rather than in discharge of them altogether, and I cannot say that the object which the defendants have in view is not strictly legitimate and proper on their part. If under all the circumstances the plaintiffs are not entitled to the large amount of damages claimed by them, it must surely be competent to the defendants to elicit from the plaintiffs anything which can have a tendency to establish that fact. If, for instance, the testator had his life insured, and the plaintiffs, as his executors, had received after his death for such insurance an amount, the interest of which would exceed the annual income of the testator while living, and exercising his ordinary avocations, it must surely be competent to the defendants to shew that the widow can have sustained no pecuniary damage by the death of her husband; and the action being for the injury arising in a pecuniary point of view, nominal damages only, if any, could in such case be recovered. If,

again, the testator was a person in very affluent circumstances, so that his death could not deprive his wife or family of anything to which they were accustomed while he was living, it could scarcely be said that they had sustained any pecuniary loss; and if that kind of loss is all that a jury can be called upon to estimate, as appears to be decided in various cases, (a) then a jury could not be expected to give damages to cover a loss which was not felt, however great the loss in other respects might be.

It may be said that it is unreasonable to require the plaintiffs in this action to make public all the affairs of the estate, and to shew what legacies are given or expected, and to whom or from whom; but when the executors have brought an action to recover for a pecuniary loss, they must be prepared to show the extent of the loss sustained. If the estate which they represent is one of extreme wealth, it would seem unreasonable that they should be pressing for large damages, which are not necessary to the comfort or support of the testator's family, on whose behalf the action is brought. If, on the other hand, the estate is limited or cramped in its means, the evidence of that fact would establish good grounds for rendering increased damages, in proportion to the advantages derived from the exertions of the testator in sustaining and advancing his family; and if the estate be embarrassed in its circumstances, so that an exposure of its affairs might induce creditors to press their claims, who would not otherwise be disposed to do so, I cannot see that more could be required in any interrogatories or that any parties could be required to answer further, than that the estate was insufficient to afford such a support as was enjoyed during the lifetime of the testator, and such as might reasonably be expected to continue if he were still living. It ought not to be required of executors to state the precise value in pounds, shillings and pence of the estate; but if an interrogatory were put, it would be for the parties interrogated to say whether they would answer it or not, and if any attempt were made to punish a refusal as a contempt, the question would then arise whether the interrogatory was

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(a) See *Blake v. Midland Railway Co.* 18 Q. B. 93.

proper or not. The plaintiffs might be called by the defendants as witnesses in the cause, and any questions which could properly be put to them, as such, may be put to them by way of interrogatories before the trial, though the object may be to mitigate the damages. If the defendants desire to inspect any documents in the plaintiff's possession, which may be necessary for their defence, there is a mode provided by the 175th section of the Common Law Procedure Act, by which such inspection may be obtained, and that mode must be adopted; but I cannot see that the defendants can insist on the production and setting out of such documents in any answers to interrogatories. They might as well try to exact the setting out of any mortgages or other securities for money belonging to the estate—a course of proceeding which would be unreasonable, and extremely inconvenient.

Considering that the defendants are as much entitled to go in mitigation of damages in this case, as if it were one for causing the death of a person who was a mere burthen and a nuisance to his family, I am of opinion that the defendants are entitled to propose interrogatories in reference to the estate in general terms, but not descending to particulars, which it would be inconvenient and useless to make known. If it be necessary that the interrogatories should be produced and approved of by the court or a judge before an order is made authorising interrogatories to be put, then I must say that some of those submitted in this case as proper to be put to the plaintiffs do not appear to me to be so. The first asks for a copy of the testator's will; and the fourth asks who are the legatees and devisees under the will, and the amounts they will respectively derive under it. If it were expected that the copy of the will would be produced, then the information sought in the fourth interrogatory would be furnished, and that would become wholly unnecessary. The questions may be much more general in their terms, and yet sufficient to elicit all the information essential for the defendants to know, either for the purpose of defence or in mitigation of damages; and I think it may be left to the defendants to re-model the interrogatories, and to apply



again before a judge in Chambers for an order on the plaintiffs to answer them. (*a*)

BURNS, J.—In consequence of the Chief Justice having referred the defendants to the court on the subject of proposing interrogatories to the plaintiffs, the defendants have obtained a rule to shew cause why the plaintiffs should not answer interrogatories to be propounded to them.

The questions proposed now to be put to the plaintiffs somewhat differ from those previously proposed, and which were discussed in Chambers. The defendants now desire to put the following questions :

1. What is the amount of assets you have realized, over and above all debts and liabilities due under the will of the late Adam Ferrie ?

2. State the property you have under your control as executrix and executor of the late Adam Ferrie, not disposed of, and not included in interrogatory number one.

3. Who are the legatees and devisees under the will of the late Adam Ferrie the younger, and what is the amount they will respectively derive thereunder and thereby ?

4. Have any of the said legatees or devisees any further or ulterior expectations, reversions or interest, not included in the foregoing interrogatories, and which may be derivable from other real or personal estate in which the said Adam Ferrie had an interest or reversion ? If so, set them forth fully, and the value or estimated value thereof.

5. Has the said Mary Woodly Ferrie, or will the child of which she is pregnant, in case one should be born, have any interest, dower, or rights, out of any property whatsoever, in right of the said Adam Ferrie, and not included in the said interrogatories, from any other source whatsoever ? If so, set them forth fully.

It does not appear to me that the third and fourth interrogatories are proper questions to put to the plaintiffs in this action. The action is brought upon the statute 10 & 11 Vic.,

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(*a*) See *Osborne v. the London Dock Co.*, 10 Ex. 698 ; *Thol v. Leask*, *Ib.* 704 ; *Whateley v. Crowter*, 5 E. & B. 709 ; *Tetley v. Easton*. 18 C. B. 643.

ch. 6, and such action is declared by the statute to be for the benefit of the wife, husband, parent and child of the person whose death shall have been caused in such way, if death had not ensued, as would have entitled the injured party to maintain an action, and recover damages in respect thereof.

The generality of these two interrogatories do not seem to point at such a discovery as would be material to make in this action, which is brought to recover damages for the benefit of a widow and an unborn child. If it would be material to know who the legatees and devisees under the will of the late Adam Ferrie are, that information must be sought in another way. Whatever knowledge may be acquired from written documents, the course is to apply for inspection of the original documents, if they are in the possession of the party.—*Scott v. Zygomala* (4 E. & B. 483), *Herschfeld v. Clarke* (11 Ex. 712). These two interrogatories should be disallowed.

I think the first, second, and fifth interrogatories may, however, be properly put to the plaintiffs. If the interrogatories are put with a view solely of discovering what the plaintiffs' case is, I agree that the court will disallow the interrogatories; for I think the object of the statute is to enable one party to obtain a discovery of something material to his own case, and not a discovery from his adversary of what his case consists of. If both parties are interested in the same inquiry, on matters which are material to both, then the rule is that either party may put interrogatories of inquiry into such matters.—*Whately v. Crowter* (5 E. & B. 709). Supposing this action to be well founded upon the statute, then it is a very material matter to inquire into the damages that should be recovered. According to the decision of the case of *Blake v. Midland Counties Railway Company*, (18 Q. B. 93) nothing but damages for pecuniary loss can be sustained in any action upon this statute. It is therefore a material inquiry to be made on the trial of this action, what was the extent and nature of the business in which the deceased was engaged, and also what was the nature and extent of his assets at the time of his death, so as to form

an idea of the pecuniary loss the widow and children may have sustained. The plaintiffs themselves will be obliged to give evidence of this description to entitle them to recover damages; and it appears to me that it is very important to the defendants as against the demand for damages, that they should be armed with information as to the state in which the deceased left his affairs; and there certainly is no one who so properly can give that information as the plaintiffs, who are the executors.

It may be material to the defendants to have the information which the answers may give them. I cannot say that it is not; and if it may be material, then, though the plaintiffs are interested in the same inquiry to support their case they should give the information sought to the defendants.

I think the defendants entitled to answers to these three interrogatories.

ROBINSON, C. J., retained the opinion expressed by him in Chambers.

A rule was granted, permitting defendants to put the first second, and fifth interrogatories in a more general form, and apply again in Chambers to have them allowed.

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#### MOFFATT ET AL. V. REES.

*Promissory note—Indorsement by defendant of negotiable note not endorsed by payees—Pleading.*

Declaration—That one S. & R. being indebted to the plaintiffs on the 18th of April, 1856, by their promissory note now overdue, promised to pay to the order of the plaintiffs £150, three months after date; and for the better and more perfect securing and guaranteeing the payment thereof the plaintiffs delivered the said note to defendant, who endorsed the same to the plaintiff; and the said note was duly presented for payment and dishonoured, whereof defendant had notice, but did not pay the same.

*Held* bad, as shewing no cause of action.

DECLARATION.—Second count, for that one Smith and Rees, being indebted to the plaintiffs, on the 18th of April, 1856, by their promissory note now overdue promised to pay to the order of the plaintiffs, at the agency of the Bank of

Upper Canada in Kingston, the sum of £150, three months after date, and for the better and more perfect securing and guaranteeing the payment thereof to the plaintiffs delivered the said note to the defendant, who endorsed the same to the plaintiffs and the said note was duly presented for payment, and was dishonoured, whereof the defendant had due notice, but did not pay the same.

Demurrer, that the promissory note mentioned being made payable to the order of the plaintiffs, the said note could not become transferable or negotiable until endorsed first by the plaintiffs, and that the indorsement of said note by defendant only conveyed no title or interest to the plaintiffs.

*Galt* for the demurrer relied upon *West v. Brown*, 3 U. C. R. 290.

*Phillpotts*, contra, cited *Peck v. Phippon*, 9 U. C. R. 73; *Foster v. Farewell*, 13 U. C. R. 449; *Wilders v. Stevens*, 15 M. & W. 208; *Boulcott v. Woolcott*, 16 M. & W. 584; *Britten v. Webb*, 2 B. & C. 483; *Skilbeck v. Porter*, 14 U. C. R. 430.

ROBINSON, C. J.—I am of opinion that the second count states no good cause of action.

It is plain that the defendant, Samuel Rees, who put his name as indorser in blank on a note payable to the plaintiffs' order, did not thereby make himself liable to be sued as indorser of the note, on the custom of merchants, because the payees had never indorsed it, and without their indorsement, the indorsement of any third party would be merely nugatory; and this is independent of the other objection, resting on the authority of *Bishop v. Hayward*, and that class of cases—namely, that, under particular circumstances, an action cannot be supported against an indorser of a note by a person who would be liable over to such indorser by reason of his own position as first indorser. The plaintiffs here have not attempted to treat the defendant as a maker of the note, and could not have succeeded in an action brought upon that footing, so long as *Gwinnell v. Herbert* (5 A. & E. 436) continues to be recognised as authority.

The only question that remains is whether this count can be sustained as a count upon a guarantee by the defendant



of the debt due by Smith and Rees to the plaintiffs. I think clearly not, for it states no consideration such as would be necessary under the Statute of Frauds to support an undertaking to pay the debt of another; and in fact the action is not on a guarantee, but evidently against the defendant as indorser of a negotiable note, which, according to the statement, it has been attempted to negotiate in a manner which the law and the form of the instrument do not admit; that is, without any indorsement by the payees mentioned in the note.

If upon a count framed as this is an action should be sustained under the circumstances, then in all such cases the party writing his name upon the note, without any indorsement being made by the payee, might be sued simply as an indorser; for nothing more is stated here, as regards the purpose or object for which the defendant wrote his name on the back of the note, than that "*he indorsed the said note to the plaintiffs,*" which is what is stated in all actions against indorsers.

The case of *Britten v. Webb* (2 B. & C. 483) cited in the argument shews that this count cannot be sufficient as shewing a cause of action on any peculiar ground, if that were intended.

MCLEAN, J.—The case of *Bishop v. Hayward* (4 T. R. 470) in which judgment was arrested, was precisely like this. The declaration stated the making of the note by one Collins, payable to the plaintiff or order, and the indorsement afterwards by plaintiff to defendant, who afterwards re-indorsed it to the plaintiff. The general issue was pleaded, *non assumpsit*, and a verdict given in favour of the plaintiff. The judgment, however, was arrested, on the ground that the plaintiff did not shew on the record any right to recover; and Lord *Kenyon*, in giving judgment, said there might be circumstances which if disclosed on the record, might entitle the plaintiff to recover against the defendant on the note: that a case might happen in which the plaintiff might have stated that his name was originally used for form only, and that it was understood by all the parties that the note, though

nominally made payable to the plaintiff, was substantially to be paid to the defendant ; but in such case the note should have been declared on according to its legal import, as in the case of *Minet v. Gibson* (3 T. R. 481). The replication to the first plea states facts such as Lord *Kenyon* referred to in the case of *Bishop v. Hayward* ; and perhaps, as these appear on the record, there might be no grounds for arresting the judgment such as prevailed in that case ; but the second count may nevertheless be insufficient on demurrer. It does not allege any consideration for the defendant's indorsement, but says that the plaintiffs, for the better securing and guaranteeing the payment of the amount, *delivered* the note to the defendant. They do not say they indorsed it so as to give him an interest in it, and that the defendant then indorsed the note to the plaintiffs. The facts then disclosed by the plaintiffs in that court, are that after the making of the note payable to the plaintiffs they delivered it to the defendant, who thereupon indorsed it and gave it back to the plaintiffs, without any consideration of forbearance to the maker, or any benefit to result to any one but the plaintiffs, and without any undertaking to indorse if the plaintiffs would accept the maker's note. The want of any consideration being stated for the defendant's indorsement makes this case different from the case of *Wilders et al. v. Stevens* (15 M. & W. 208). The case of *Foster et al. v. Farewell* (13 U. C. R. 449) is similar to the case of *Wilders et al. v. Stevens*, and shews a sufficient consideration for the defendant's indorsement and liability ; and the case of *Morris v. Walker* (15 Q. B. 588) was similar, and decided on similar grounds. In the case of *Boulcott et al. v. Woolcott* the plaintiffs alleged in the replication, that it was agreed between them and the defendants and the acceptors of the bill, to forbear and give time to them respectively to pay *another bill* accepted by one E. W. and afterwards indorsed to defendant and by defendant to plaintiffs, till the time for payment of the bill declared on had elapsed ; and they averred that the plaintiffs had foreborne to sue accordingly. This was held on special demurrer to be a departure from the declaration, but the facts stated are somewhat different from the

other cases of *Wilders et al. v. Stevens and Morris v. Walker*, and the case of *Foster v. Farewell* was not considered as sufficient authority to overrule these cases, and was not relied on. The plaintiffs' delivery of the note for the purpose of getting defendant's indorsement as an additional security for themselves, could not entitle the plaintiffs, as the holders of the note, to sue the defendant, without some special agreement being shewn for the defendant's assuming the liability and no such understanding or agreement is set out in the second count.

It appears to me, under these circumstances, that the count is bad in substance, and judgment on demurrer must be in favour of defendant.

BURNS, J.—The count demurred to is undoubtedly bad. It does not profess to charge the defendant as an indorser of the note in the ordinary way of merchants, but as a guarantee for the security of the payment of the debt to the plaintiffs which the makers of the note owed them. To charge the defendant as such, it should have appeared upon what consideration the defendant became security for the makers of the note.

The case of *Skilbeck v. Porter* (14 U. C. R. 430) does not apply to this case, for there the note was not made a negotiable one on the face of it, and no count in the declaration would support the facts of the case. The count in the present case seems to be framed to meet the difficulty of the cases of *Thew v. Adams*—an old case in this court—*West v. Bown* (3 U. C. R. 290) and *Wilcocks v. Tinning* (7 U. C. R. 372). The proper mode of meeting the difficulty is to shew that the plaintiffs first indorsed the note to the defendants without recourse, and then that the defendant indorsed the note to the plaintiffs. This was the case in *Smith v. Marsack* (6 C. B. 686), and *Morris v. Walker* (15 Q. B. 589) acted upon in this court in the case of *Peck v. Phippon* (9 U. C. R. 75), and in a case of *Helliwell v. Boulton* the year previous, not reported. The latter case was before the court upon demurrer to the replication, asserting, in answer to the plea, that though the payee and

first indorser was one and the same person, that he had indorsed to the defendant without recourse. The vice in the count of the declaration before us consists in this, that the note has not been indorsed by the payees so as to make it a negotiable instrument according to the custom of merchants and consequently the defendant cannot be charged as indorser of it until it has been made negotiable. And he cannot be charged as a guarantor for the payment of it without the consideration for becoming such being stated.

Judgment for defendant on demurrer.

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MOFFATT ET AL. V. REES.

*Promissory note—Action by plaintiffs as indorsees, being also payees against indorser—Plea setting up their liability over to defendant—Replication—Evidence.*

Declaration by G. M. & Co., on a promissory note made by S. & R., payable to G. M. & Co., or order, indorsed by them to defendant, and by defendant to plaintiffs. *Plea*, that G. M. & Co., the plaintiffs, and payees of the note, and the same persons who indorsed it to the defendant, and are liable to defendant as such indorsers, if he should be made to pay. *Replication*, that the plaintiffs' names were used as payees for form only; and it was understood by all parties to the note that although nominally made payable to the plaintiffs, it was substantially to be paid to defendant, because, by a special agreement between plaintiffs and defendant, notwithstanding the form of the note, the plaintiffs were not to become liable to defendant by indorsing to him.

The evidence shewed that the note was given to enable the makers to get goods on credit from the plaintiffs, and that defendant knew he was indorsing for that purpose.

*Held*, that the plaintiffs were entitled to recover.

The plaintiffs sued on a promissory note. In the first count they charged that Smith and Rees, on the 18th of April, 1856, by their promissory note, promised to pay to the order of Gillespie, Moffatt & Co., £150, three months after date; and that the said Gillespie, Moffatt & Co., indorsed the said note to the defendant, who indorsed the same to the plaintiffs; and presentment to the maker was averred, and notice of non-payment to the defendant,

The defendant pleaded to this count, that the persons trading under the style and firm of Gillespie, Moffatt & Co., and mentioned in the first count, were the plaintiffs; and that the plaintiffs, and no others were the payees of the note sued on, and the same person who indorsed the note to the



defendant, who were liable as such indorsers to the defendant, in the event of the note being paid by him.

The plaintiffs replied to this plea, that their own names were originally used for form only as payees of the said note, and it was understood and agreed by all the parties thereto, that the note, although nominally made payable to the plaintiffs, was substantially to be paid to the defendant; because, by a special agreement between the plaintiffs and the defendant, notwithstanding the form of the note, the plaintiffs are not nor ever were to become liable to the defendant by indorsing the note to him, but the defendant was by his indorsement thereon to become, and is liable to the plaintiffs.

The plaintiffs took issue upon this plea.

The declaration contained a second count, which was demurred to, and determined to be bad. (a)

In a third count the plaintiffs declared that Smith and Rees made a promissory note, payable to the order of *the defendant*, who indorsed to the plaintiffs. To this count the defendant pleaded, that he did not indorse the note in that count mentioned.

There were two other counts in the declaration, which were not supported by the evidence.

Upon the trial, at Kingston, before *Hagarty, J.*, the plaintiffs called the defendant, who swore that Smith and the defendant's son were the Smith and Rees who made the note, and that he indorsed it at Smith's request, who told him that he was going to send it to the plaintiffs, who supplied him with goods. They afterwards failed, and made an assignment of property to him, the defendant, to secure him; but this note, he said, was not provided for in the assignment; that is not particularly mentioned in it; and that he always thought the note illegal; that is, not binding on him. He was liable, he said, to the plaintiffs for £750, exclusive of this note. He swore that he was a farmer, not accustomed to such business: that he knew nothing of the plaintiffs, and had made no agreement of any kind with them, nor authorized any one to do so for him.

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(a) See *Moffatt et al. v. Rees*, ante page 522.

It was proved by a clerk of the plaintiffs, that Smith & Rees dealt largely with the plaintiffs : that one of their notes to the plaintiffs had fallen due, and he called on them about it, and obtained the note sued on as a renewal in full : that he would not have taken it without the other name (defendant's) on it : that when Smith & Rees failed the witness went there, and found defendant in possession of their effects with his son, and saw the assignment. The defendant had indorsed another note besides this, which he paid. The witness said he did not then know that this note was informal ; that he asked the defendant to pay it ; he made no objection, and promised to do so. The note was not yet due. Defendant said it would not be paid exactly when due, but would be paid soon after.

It was objected, that the plaintiffs could not recover on this evidence on any of the counts, as the note had never been indorsed by the payees. To obviate that objection the name of the firm, Gillespie, Moffatt & Co., was then, at the trial, written above the defendant's name, thus :

Without recourse,  
GILLESPIE, MOFFATT & Co.,  
Per A. T. PATERSON.

Mr. Paterson was the clerk who gave the above evidence. No proof was given of any authority to him, either general or special, to indorse notes. The defendant objected, that the plaintiff could, nevertheless, not recover ; and the learned judge inclining to that opinion, recommended that the verdict should be found for the defendant ; but it was agreed that a verdict might be entered for the plaintiffs for the note and interest, £159, if the court should think that this action could be sustained on the note.

*Kirkpatrick*, A. C., obtained a rule *nisi* to enter a verdict for the plaintiffs pursuant to the leave reserved. *Galt* shewed cause. *Phillpotts* supported the rule.—The following cases were cited: *Peck v. Phippon*, 9 U. C. R. 73 ; *Morris v. Walker*, 15 Q. B. 589 ; *Foster v. Farewell*, 13 U. C. R. 449 ; *Wilders v. Stevens*, 16 M. & W. 208 ; *Smith v. Marsack*, 6 C. B. 486 ; *Boulcott v. Woolcott*, 15 M. & W. 584 ; *Bishop v. Hayward* 4

T. R. 470 : Penny v. Innes, 1 Cr. M. & R. 440 ; Stor. on Prom. Notes, Secs. 478-480 ; Herrick v. Carman, 12 Johns. 159.

ROBINSON, C. J., delivered the judgment of the court.

The second count is out of the question, having been demurred to and determined to be bad. The third and following counts were not supported by the evidence at the trial, and it only remains to be considered, whether upon the first count, and the issues raised upon it, the evidence entitled the plaintiffs to recover.

This cases differs from Morris v. Walker (15 Q. B. 589) and from Smith v. Marsack (6 C. B. 486) in the circumstance that the payees of the note had in both those cases indorsed the note in the proper order as first indorsers ; and the single question was, whether the difficulty that a prior indorser of a note cannot sue a subsequent indorser, because he is *prima facie* liable to him as standing between him and the maker, could be met by proving such circumstances as were stated by the plaintiff in his replication. Here the objection raised at the trial was, that it was clear that when the action was brought, and up to the time of the trial, the payees had made no indorsement of the note ; and till they had done so this defendant, it was contended, could not have been liable at any rate as indorser, because he had not yet any legal interest in the note, and so could not transfer the note to any one, and could not stand in the relation of indorser according to the custom of merchants.

But the special plea to the first count does not deny the statement in that count, that the payees indorsed the note to defendants before he indorsed to the plaintiffs. We must, therefore, assume that that was so ; and we must take up the case upon the special plea and the answer to it, and see who ought under the evidence to have had a verdict upon the issue raised.

The defendant's plea merely sets up what was a good defence *prima facie*: namely, that the plaintiffs and the payees of the note are the same persons.

The plaintiffs admit the identity, but reply special circumstances, for the purpose of overcoming the difficulty presented

by the second plea, by shewing that the objection of circuitry of action will not apply, for that the plaintiffs were not to be, and never can be made liable to the defendant on the note.

The difference between this case and that of *Peck et al. v. Phippon* (9 U. C. R. 73), which was referred to on the argument, is that in that case the indorsement by the defendant was traversed by a distinct plea which made it necessary to prove a legal indorsement, such as would transfer the note under the custom of merchants. Here there is no such plea to the first count; on the contrary, the indorsement of the payees and of the defendant are admitted as having been made in the proper order; and the defendant has raised upon such admitted indorsement in the order stated the objection that the plaintiffs, being the payees and first indorsers, cannot recover against the second indorser.

All we have to look to, therefore, is whether the plaintiffs have supplied such facts as obviate the legal objection, and whether the evidence proved the substance of the replication.

We think the replication does avoid the objection, raised by the plea; and at any rate it has not been demurred to. Has it then been proved by the evidence? We think it has.

It is not necessary in such cases that all the parties should be together, and make the agreement spoken of simultaneously, nor is it necessary to shew that such an agreement was in express words ever made. It is implied by the court and jury from the purposes for which the note was given and the indorsement obtained, shewing who was to be the person paid, and were the persons relied upon for paying, and shewing also that all the parties concerned knew these facts, and the relation in which they severally stood, not in point of law only, but as regarded the understood liability to pay.

We think the evidence of the plaintiffs' clerk, and of the defendant himself, who was called by the plaintiffs, makes it clear that the defendant knew he was indorsing for his son and his partner, in order to enable them to get goods on credit from the plaintiffs. He must in reason therefore have known and assented, that if he should have to pay the note for the makers, he could never be allowed to get back



the money from the plaintiffs, because that would defeat the very object of taking his indorsement, which was to secure the plaintiffs. We have not to consider upon this record the sufficiency of the plea in point of form or substance.

It was proved, we think, and substantially, and as such pleas are expected and required to be proved.

Rule absolute.

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### SNYDER V. PROUDFOOT.

*Sale of land—Failure of title Right to recover back purchase-money—Money had and received—Conduct of parties.*

By an agreement between the plaintiff and defendant, defendant agreed to sell and plaintiff to buy certain buildings specified, "with the land which they occupy, with the whole of the dam and water-privilege," for £3,300; £250 to be paid on the 1st of January; £250 on the 1st of March, &c.: plaintiff to have full possession by the 1st of February; a free and satisfactory deed to be given on the 1st of January, when the first £250 was to be paid.

The plaintiff took possession, and the two sums of £250 were paid. After he had taken possession, it appeared on a survey being made, that some of the buildings were on an original allowance for road, and that defendant in consequence could not convey that part of the property; the plaintiff being told of this by the surveyor said it must be put right between defendant and himself, and that these buildings must be left out of the deed, which the surveyor was to prepare. Afterwards he made the second payment of £250, and a deed was prepared, including the land not within the road allowance, and also, all the buildings on the allowance. This, however, was not executed, and the plaintiff remained until July, when he left and the defendant assumed possession, under what circumstances did not appear, and afterwards sold again to another party for £3,650.

*Held*, that the evidence was sufficient to support a verdict in favour of the plaintiff for the £500 paid, either on a common count for money had and received, as being paid on a consideration which had failed, or on a special count as damages for the breach of agreement in not giving a deed.

*Held*, also, on motion in arrest of judgment, that the declaration, set out below, sufficiently shewed that the plaintiff had given up possession; and if not, that the defect was supplied by the 9th plea.

*Held*, also, that upon the evidence stated below, the agreement to purchase the saw-mill in addition to the other buildings was to be considered as an additional purchase only, not as an alteration or abandonment of the first agreement.

*Quære*, per *Robinson*, C. J., as to the effect of the uncertainty in the agreement with regard to the description of the premises.

The first count of the declaration set out a special agreement, stating that—in consideration that the plaintiff had agreed with the defendant to purchase from him certain land, mills, water-privilege, and property, as the property of the defendant, alleged and pretended to be the property of the defendant; that is to say, the flouring mill, dwelling-house, store-house and store, miller's

house, teamster's house, and driving-house of the defendant, with the land which they occupied, with the whole of the dam and water privilege of the defendant, situated in the Township of Trafalgar, at the price or sum of £3,300, to be paid by the plaintiff to the defendant, as follows: that is to say, £250 on the 1st of January after the agreement, £250 on the first of March after, £400 one year thereafter, and £500 yearly, with interest, until the whole sum should be paid—the defendant, on the 1st of December, 1855, promised and agreed with the plaintiff to sell, and did then sell, to the plaintiff, the said flouring mill, dwelling-house, store-house and store, miller's house, teamster's house, and driving house of the defendant, with the land which they occupied, with the whole of the dam and water-privilege of the defendant, at the price or sum and on the terms aforesaid; and also that the plaintiff should have full possession thereof on the 1st of February then next, and also that at the time the first mentioned £250 should be paid, the defendant should cause to be given to the plaintiff a free and satisfactory deed of conveyance thereof to the plaintiff, on payment by him of the £250 on the 1st of January then next, and that the plaintiff should, in case of such payment, have possession of the mill, houses, buildings, water-privilege and other property. The count then averred that the plaintiff, relying upon the agreement, before the 1st of January, paid the £250, and afterwards, and before the first of March, paid the second payment of £250, and afterwards, to wit, on the 1st of March, did pay a further sum of £500, other part of the purchase money; and although the defendant did, on the 1st of February after the agreement, give the plaintiff possession of the flouring-mill and dam, and water-privilege, parcel of the property, and allowed the plaintiff to continue in such possession for the space of three months then next, he, the defendant, did not nor would on the 1st of January, or at any time since, cause to be given to the plaintiff a free and satisfactory deed of conveyance of the mill and other property so agreed to be sold by the defendant to the plaintiff, or any part thereof, but wholly neglected and refused so to do, although on the 1st of January, and at all times since,

the plaintiff was ready and willing to receive the same, whereof the defendant had due notice ; by reason whereof the plaintiff hath not only lost and been deprived of the said moneys so paid to the defendant, and the interest and enjoyment thereof, but hath been put to and sustained great loss and inconvenience in and about giving up the said possession, and in and about removing his family, goods and chattels, from the said mill and other property whereof he was so in possession.

The declaration contained the common counts for work done, money paid and received, and for interest, goods sold and delivered, and upon an account stated.

The defendant pleaded to the first count—1. That he did not promise as stated.

2. That he did not perform the agreement by the leave and license of the plaintiff.

3. That the plaintiff did not pay the first sum of £250.

4. That the plaintiff did not pay the second £250.

5. That the plaintiff did not pay the sum of £500 as stated.

6. That the defendant did, by the time specified, cause to be tendered and given to the plaintiff a free and satisfactory deed of conveyance of the mills, and other property, in full compliance with his agreement.

7. That before any supposed breach it was agreed by and between the plaintiff and defendant, at the request of the plaintiff, that he, the plaintiff, should employ a surveyor to survey and ascertain the boundaries of the property so sold, and after such survey that the surveyor should draw a deed of conveyance thereof from the defendant to the plaintiff, in accordance with such survey ; and defendant says that the plaintiff did employ a surveyor, who made the survey, and prepared a deed thereof from the defendant to the plaintiff, in accordance with such last-mentioned agreement, and the agreement mentioned in the first count, and the defendant was always ready and willing to execute the deed so prepared, but the plaintiff wholly refused to accept the same, and discharged the defendant from the execution thereof, and from the performance of the agreement.

8. That the defendant has always been ready and willing

to perform the agreement mentioned in all things on his part to be performed, but that the plaintiff discharged the defendant from the performance thereof, and abandoned the agreement of his own accord.

9. That after the plaintiff had taken possession of the premises under the agreement for the space of six months, the plaintiff requested the defendant to take the premises off his hands, and then voluntarily gave up the same to the defendant, and then abandoned the said premises, and rescinded the agreement, and then the defendant retook possession of the said premises at the request of the plaintiff.

10. That before the defendant was required to perform any part of the agreement the same was abandoned, and a new agreement made, whereby the plaintiff agreed to purchase, in addition to the new premises mentioned in the count, a certain saw-mill and other premises, for the additional sum of £250, and by the last-mentioned agreement it was stipulated and agreed that the plaintiff should employ a surveyor, who should ascertain the boundaries of both said premises, and prepare a deed of the whole comprised in both agreements: that the plaintiff did employ a surveyor, who made a survey of both premises, and prepared a deed in accordance with such survey for the defendant to execute, and the defendant offered to do so, and perform all things required of him by the last mentioned agreement, but the plaintiff refused to allow the defendant to do so, and discharged the defendant wholly from the performance and execution of the last-mentioned agreement.

The 11th and 12th pleas were to the other counts of the declaration—not indebted, and payment.

The 13th plea was to the whole declaration, a set off.

The replication took issue on the 1st, 2nd, 3rd, 4th, 6th, 7th, 8th, 9th, 10th, 11th, and 12th pleas; and there was a demurrer to the 5th and 13th pleas.

At the trial, before *Burns, J.*, at the last assizes held at Hamilton, the written contract, dated the 1st of December, 1855 as set out in the declaration, was proved. The surveyor who was employed by the plaintiff to ascertain the boundaries of the land to be conveyed, proved, on the part of the plaintiff, that



in the month of January, 1856, and after the plaintiff had taken possession of the premises, he made a survey of the same. During part of the time that he was engaged both plaintiff and defendant were with him. In the course of his survey, it was found that thirteen feet of the south-east end of the grist-mill, the whole of the driving-house, the teamster's house and the oat-mill, were situated upon the original allowance for road, reserved for the road called Dundas street.

The surveyor stated that until he made the survey he did not know, and it could not be known without a survey being made, that these buildings were upon an original allowance for road. The travelled road at that place leaves the line of Dundas street, and descends the bank of the Sixteen Mile Creek, and crosses the stream on the defendant's land, the banks of the stream being such that it is impossible to construct a road on the original allowance reserved for it. The surveyor further stated, that when he discovered the fact of these buildings being situated on the original reservation, he called the attention of the plaintiff to it, who asked him if the defendant could convey the road allowance to him, and the surveyor informed him that he could not do so. The plaintiff then stated that that was a matter which should be set right between the defendant and himself.

Both the plaintiff and defendant had instructed the surveyor to prepare a deed of conveyance of the property, when he should ascertain the boundaries and complete the survey, and when the surveyor told the plaintiff that the defendant could not convey to him the road allowance, he said he might leave that out of the deed. The plaintiff then informed the surveyor that he had agreed for a further purchase of the saw-mill from the defendant, and he should make a survey of that, and include it also in the conveyance. The surveyor did so, and he prepared a deed of conveyance of all the property, mentioning the driving house, teamster's house, and oat mill, but leaving out the land on which they stood, and the whole of the original reservation for road, and also the travelled road. The deed was never executed by the defendant, but produced in court as it had been prepared

at the plaintiff's request, who agreed that the mortgage should be prepared by an attorney in Toronto, covering the premises as surveyed by the surveyor, in order to secure to defendant the payment of the residue of the purchase money.

The plaintiff remained in possession until the beginning of July, when he restored the possession to the defendant, and after the possession was restored the surveyor stated that in a conversation with the plaintiff he informed him that he knew, about the time that he had taken possession, that the buildings mentioned stood on the reservation for road. The plaintiff admitted that he did know it then, but said that he had paid money upon the purchase previously, and he thought it necessary to take possession, but that he afterwards gave up the possession, because he contended the defendant could not make him a good title. It was admitted that the plaintiff had paid to the defendant the two first payments, amounting to £500, and that the defendant was further indebted for goods sold and delivered to the amount of £30 13s. 9d ; and it was admitted that since the defendant had assumed the possession of the premises he had re-sold the same to another person.

The defendant then proved that the grist mill so sold had been erected on its present foundation, about thirty years ago, and the other buildings had been put up from time to time since : that the original allowance for road was impassable at the place where the building stood, and would ever remain so, and that the travelled road had ever since a road had been travelled at all, and for more than 40 years, been in the place now used, through the lot of land owned by the defendant. The person who purchased from the defendant since he had resumed the possession was examined, and he stated that he, in October, 1856, purchased the same premises bargained for by the plaintiff from the defendant, for £3,650, knowing the situation of the buildings to be upon the road allowance, but that he did not care about that. In his bargain with defendant an allowance of £20 was made, as being what it might cost to procure an act of parliament to cure the defect of title respecting the road allowance ; and the witness stated he preferred the deduction to paying the £20, as he

never supposed any one would think it worth while to complain about the mill and buildings occupying the road allowance. The defendant then put in two letters, one from the solicitors of the plaintiff, dated 23rd of May, 1856, on the subject of procuring an act of parliament for the allowance for road, and the other from the plaintiff, dated 23rd of June, 1856, stating that he, the plaintiff, could not sign or accept the deed prepared, but that they, the parties, must have another bargain, and that another conveyance must be prepared.

It was not disputed but that the plaintiff was entitled to a verdict on the count for goods sold and delivered, for £30 13s. 9d.

The defendant contended that upon some or one of the following pleas, he was entitled to succeed in bar of the plaintiff's demand to have the £500 returned to him—namely, the 2nd, 7th, 8th, 9th, or 10th.

The learned judge expressed an opinion upon the tenth plea, that there was no evidence of a substituted agreement for the first, even if the plea could properly be construed as setting up an abandonment of the first agreement, and that another was substituted in lieu of it, for the witness proved that the purchase of the saw-mill property was a second purchase in addition to the first, and a distinct bargain made for it. With respect to the other pleas, their nature and the facts stated therein were distinctly called to the attention of the jury, leaving the matters of fact to be determined by them, without any opinion from the judge. The jury found for the plaintiff upon all. The plaintiff claimed interest upon the £500 so paid to the defendant, but the learned judge told the jury that the plaintiff had occupied the premises for some five months or so, and it would be natural to suppose he would have derived some benefit or advantage from it, though neither of the parties had given any evidence upon that point, or to shew on what terms the possession was given up or again assumed by the defendant; and the jury disallowed the claim for interest, and found for the plaintiff for the money paid £500, and for the goods sold and delivered £30 13s. 9d.: in all £530 13s. 9d.

*Eccles*, Q. C., (*S. M. Jarvis* with him) obtained a rule to shew cause why verdict should not be set aside, and a new trial had between the parties, without costs, the verdict being contrary to law and evidence, and for misdirection, and the damages being excessive; or why the judgment should not be arrested, on the ground that the first count disclosed no cause of action.

*O'Reilly*, Q. C., shewed cause, and cited *Wilde v. Fort*, 4 Taunt. 334; *Gosbell v. Archer*, 4 N. & M. 445; *Wright v. Coles*, 8 C. B. 150; *Hunt v. Silk*, 5 East, 449; *Blackburn v. Smith*, 2 Ex. 783; *Dart V. & P.* 610, 615.

ROBINSON, C. J.—As the written agreement between these parties is singular in its terms, and something may turn on its want of ordinary precision and certainty, I will state its exact words. It was not under seal, and runs thus :

“*Trafalgar, December 1st, 1855.*

“John Proudfoot, Esq., sells, and Michael Snyder buys, his flouring mill and dwelling-house, and store-house and store, and miller’s house and teamster’s house, and driving-house, with the land which they occupy, with the whole of the dam and water privilege, for the sum of £3,300, £250 to be paid the 1st of January, £250 to be paid the 1st of March, and £400 the year after, and £500 yearly till paid, with interest, as the sums become due; and it is further agreed that I am to have full possession the 1st of February. At the time the first £250 is paid, the 1st of January, 1856, a free and satisfactory deed shall be given, and full possession given on the 1st of February, 1856.

“(Signed),                   JOHN PROUDFOOT,  
MICHAEL SNYDER.”

This paper appears to me to be in the hand-writing of the plaintiff, judging from his letters produced in evidence. However that may be, the obscurity in its language is chargeable against both, and affords no more excuse for the one than the other for seeking to retract from the bargain. There is nothing precise and certain as to the quantity or exact locality of the land that the plaintiff was to get with the buildings, only that he was to have “the land which they occupy, with the whole of the dam and water privilege.”



"*The land which the buildings occupy*," taken literally, means only the land which each building respectively covers. That would not afford facility of communication between one and the other, nor perhaps any convenient means of access even to the mill. The parties could not mean that the words should be understood in that sense. Whether the defendant owned the land between and among all these buildings, so that he *could* have conveyed a tract which would have embraced them all, with that exception of the original allowance for road, which has either given rise to or has been made the pretence of the difficulty, is not explained. If the defendant could have conveyed such a tract, then its size and figure should have been agreed upon, and specified in the writing; because, if it was intended that under the words "*the land which the buildings occupy*" any thing more was to be conveyed than the ground which the several buildings cover, no two persons would agree in setting out the tract that should go with the buildings.

They are not it seems in a row, but are exhibited on the plan as being scattered about in a very irregular manner; and whether a line outside of the whole should be drawn, so as to include them all, and if so whether it should barely inclose them, leaving no space outside, or whether all the vacant ground among the buildings should or should not go with them, or only what was necessary to the convenient enjoyment of each, was a point that might be much debated; and then what land it would be necessary to convey in order to embrace "*the whole of the dam and water privilege*," could not be made certain without a survey made by a person skilled in taking levels, and conversant with the subject of mill privileges.

If a court of equity had had to deal with this agreement in a suit for specific performance, could they have enforced it in its present vague terms, or would they have attempted to modify it by making a decree that should have carried into effect what they might assume to have been the intention of the parties? I incline to think they would not have interfered. If the plaintiff, Snyder, having the indistinctness of the engagement pointed out to him, before he had made any

payment, or gone into possession, had in consequence refused to do any thing under it, treating it as void for uncertainty, he could hardly have been made, I think, to pay any substantial damage, unless the defendant had made such an offer as could have left him nothing to complain of or apprehend in regard to the quantity of land he was to get. If after making his first payment in January, when he was entitled to receive a "free and satisfactory deed," or if, on his going to take possession on the first of February, and not having yet received his deed, a dispute had arisen between them as to the land that should be conveyed to him, he would have been in a position, I think, to withdraw from the bargain, and sue for his £250 back, on the ground of failure of consideration, unless the defendant had shewn a readiness to make such a deed as could leave him no just ground of complaint, giving to the language of the agreement the construction most in his favour.

But it is clear from the evidence that the plaintiff not only did not act with the decision and promptness that are necessary when a purchaser claims a right to rescind the contract, and to claim the money he has paid, but that he made in fact no difficulty about the vague and imperfect terms of the agreement, which I have noticed, but he has held himself entitled to rescind it on another ground; namely, that the defendant undertook to give him a good title to the flour-mill, and some other buildings, when he had it not in his power to do so, because the land on which they were built—that is, the mill in part, and other buildings wholly—did not and do not belong to him, but is part of a public allowance for road.

This is apparently a very serious obstacle to the agreement going into effect, for it is proved that the whole of these buildings (one of them the oat-mill), and about thirteen feet of one wall of the grist-mill, which was no doubt the principal subject of the purchase, are within the public allowance for road, and it seems that the part of the grist-mill standing upon the allowance is the important part in which the water-wheel is situated.

If this public allowance for road had been ever likely to

be opened at any time, and used as a road, there can be no question that, though neither the plaintiff nor defendant was aware, when they contracted, that the buildings stood upon it, the fact that the plaintiff, from no fault of his, but from a misconception common to both, would have failed in obtaining what he had bargained for, not merely in some trifling particular, but in the real object of his purchase, would have entitled him to repudiate the bargain, and demand back the money he had paid.

But we see that these were not exactly the circumstances. The mill and all the buildings spoken of are situated in the deep valley of the Sixteen-mile Creek, of which the banks at that point are so high and precipitous that it has never been attempted to continue the road, which is called Dundas street, in a direct line across the valley; but the road, as it has been laid out, coming up from the eastward, departs from the right line of Dundas street, and deviates to the left, as it approaches the edge of the hill; and has been afterwards brought round, as the plan exhibits, along the side of the hill into the valley, crossing in its course what would have been the line of Dundas street, if it could have been protracted and used as a road across the valley without deviating from its true course.

It may be that the road deviates to the left on the east side of the ravine before it has approached so near the edge of the precipice as to give one a view, while standing in the travelled road, of the position of the mill and other buildings in the valley, and so it may never have struck either of these parties, or any one, to observe how the buildings would have stood with reference to the road, if it could have been and had been carried through from one bank to the other in a straight line.

Whether either the plaintiff or defendant was aware how the buildings stood with reference to the discarded road allowance, is not shewn. As a general principle, we are not to assume without some proof that any deceit was intended; and for a reason which I shall presently mention, there is really no ground to imagine that there was any concealment or deceit intended in the matter.

The plaintiff and defendant seemed to have an understanding about the manner of determining what land was to be conveyed with the mill and other buildings, for in January, after the first payment of £250 was made, and after the plaintiff had taken possession, a surveyor (Winter) was employed by the plaintiff, with the assent of the defendant, to run out the lines, and frame a description of the land, and also to prepare a conveyance to be executed by the defendant, and a mortgage to be given back by the plaintiff to secure the unpaid portion of the purchase money.

Dundas street being one of the concession lines of the township, on each side of which the lots front, the surveyor found it necessary to protract the true line of Dundas street across the ravine, in order to obtain the basis of an accurate survey and description; and in doing this he ascertained the fact that some of the buildings to be conveyed, and a part of the grist-mill, are standing in the public allowance for road which allowance formed no part of the lot or lots in Trafalgar belonging to the defendant, and so could not be legally conveyed by him. The mill had been up thirty years or more, and the other buildings have been put up from time to time as they were wanted. For all that appears, the discovery was then made for the first time by the defendant of the fact I have mentioned. That may well have been so. Whether it was or not we have no evidence, but it seemed to have been little thought of when it was discovered, for reasons which were explained at the trial, and which we can all understand. The road actually used by the public, instead of the true line of Dundas street, which had been from the first abandoned as impracticable, ran through the defendant's property, and had been established and in constant use for more than forty years. No one probably had given a thought to the original public allowance, as being ever likely to come into use as a road. The law at one time provided for the public allowance, under such circumstances, being given over to the proprietor of the adjacent land, in recompense for the line of road through his land that the public had taken possession of in lieu of the original allowance; but it was found expedient to



allow this exchange to take place in all cases, as a matter of course, for in many cases the deviation from the true line may have been made at an early day, on account of some inconvenience or obstruction that could be easily overcome when the neighbourhood became populous; as, for instance, wet ground or a windfall, or some small stream: and in such cases it would be desirable that the original allowance should be opened, and the road made straight, as soon as the public should be able to defray the expense. It was therefore afterwards provided by the legislature, that any road allowance that had been abandoned should still be reserved as public property, and should not, as a general rule, be disposed of. But we observe that, upon special application made to the legislature, private acts of parliament are easily obtained to sanction their being transferred to the owner of the adjacent lands, though no doubt this is only done upon its being satisfactorily shewn that such original allowance will never be required to be made use of as a road. An act has been passed on this subject in the last session of the legislature, 20 Vic., ch. 69.

According to the evidence, there could scarcely be a case in which we could suppose there would be less hesitation in making over an original allowance to the proprietor of the adjacent land, than there would have been, or would be, in this case, upon a proper application. If it had been otherwise, and there had been a real uncertainty or difficulty in overcoming this objection to the defendant's title, there can be no doubt that the plaintiff, as soon as he discovered it, could have given up his purchase. It seems that the surveyor found this out in January, after the plaintiff had made his first payment of £250, but I think before he had actually taken possession, though it appears the plaintiff was content to go into possession before he got his deed, and to wait till the surveyor had completed his survey, so that he could frame the description. If the plaintiff had then promptly and decidedly given up his bargain, he would have been in a situation to demand back what he had paid in an action for money had and received; and I think he could equally have taken that course, notwithstanding the

great probability that there would be little or no trouble in obtaining an act of parliament vesting in him the road allowance in question, for there could be no absolute certainty that parliament would pass such an act. They could not be compelled to do so, and the plaintiff was not bound to take his chance of that, or to wait till they had done it.

As soon as he found that the defendant had it not in his power to give him a title to the buildings, and the ground on which they stood, especially the mill, as he had agreed to do, the plaintiff had a right to treat the agreement as rescinded, and to sue for his money back, as upon a failure of consideration. Here the mill was the principal object of the purchase; the other buildings, and the dam and ground, were accessories; and if the plaintiff had promptly retired from the premises, and treated the contract as at an end, taking afterwards no benefit under it, he could, I think, have maintained an action on the count for money had and received, and recovered back what he had paid, although the objection did not go to the whole of the property bargained for, and so there was not in that case a total failure of consideration, for the plaintiff would not be bound to accept part without the rest, and not having yet received a conveyance, he was in a condition to reject the whole as a matter of right, and that would have left him without consideration for his money.

But if the plaintiff had intended to take that course, of rescinding the contract, and demanding back the money he had paid, as upon a failure of consideration, it was necessary for him to proceed promptly, and not to treat the contract as continuing, and receive further benefit under it.

According to the evidence, he was told by his surveyor, in January, that part of the mill, and several other buildings, were upon the original allowance for road. If he did not know this before, which according to some portion of the evidence I infer that he did, he at least knew it then, and from good authority; but he does not seem to have cared much for the information, for when told of it by the surveyor, he only remarked that that must be made right between him and the defendant; by which I suppose he meant that the defendant must see and procure the allowance of road for him, or must

make some reasonable compensation, and he asked the surveyor whether the defendant could take upon himself to convey it, and being told he could not, he then said it would be necessary to leave that space of land out of the deed, which it had been agreed the surveyor was to prepare.

After that he must have made his second payment of £250, unless he made it before the day named in the agreement, or had given his note for it before the discovery was made, and we hear nothing of his desiring to give up the possession. On the contrary, he told the surveyor that he had agreed to buy also from the defendant a saw-mill which was on the defendant's premises, and which had not been included in the first purchase, and that the surveyor must make a survey of that property, and include it in the deed.

The surveyor, with the consent of both parties, went on and completed his survey, and then prepared a conveyance, without a check or remonstrance, as it appears, on the part of the plaintiff, which conveyance, according to the description by courses and distances, embraced only land on the north side of Dundas street, including no portion of the original allowance for road, or of the travelled road which had been laid out in lieu of it on the lot now belonging to the defendant; but the deed was made to embrace all the buildings which the plaintiff had bargained for, as well those within the old allowance for road as the others, under the following words: "and also all the buildings erected on the original allowance for Dundas street in front of the above described parcel of land."

This deed was prepared at the plaintiff's request, and with his assent a mortgage was drawn by an attorney in Toronto to secure the balance of the purchase money, which contained the same description of the premises as the deed.

These deeds, however, both remained unexecuted, though the plaintiff all the while continued in possession from January till July, when he left the place, and the defendant resumed the possession; and afterwards, in October following, sold the same property to another person for £3,650, which the plaintiff was to have had for £3,300; and it is a remarkable fact in the case, that the new purchaser, though he gave

more for the property, said so little about the circumstance of the mill and other buildings being in the old abandoned road allowance, that he preferred accepting a deduction from the price of £20, which it was supposed would about cover the expense of obtaining a private act, transferring to him the road allowance, and taking the chance of obtaining it upon himself, being satisfied, as he swore, that he would never be molested.

How it happened that the conveyance remained unexecuted, and the plaintiff continued so long in possession, or on what footing it was that the defendant resumed possession in July, was not explained. Whether the defendant went in only because the plaintiff had abandoned the possession, or whether upon any amicable arrangement or understanding, was not proved. If the parties had either agreed expressly that the bargain should be considered at an end, or had both shewna willingness to abandon it, the case would be clear, but we see only from a letter in evidence, dated the 23rd of May, 1856, that the defendant was endeavouring to procure a private act granting the road allowance, but found it impossible from the then advanced period of the legislative session.

It may have been that the plaintiff was willing to have the defect so removed, if it could be, and only retained possession under that expectation, and this with the knowledge and assent of the defendant.

On the 23rd of June, 1856, the plaintiff wrote to the defendant declining to accept the conveyance that had been prepared, saying his lawyer had advised him not to sign it. "We must make," he then said, "another bargain, and if we can agree I will get Mr. O'Reilly to draw the deed at my expense this week, as I propose going to Hamilton on Wednesday. I want you (he adds) to say what you will do, for I do not feel contented to live in this state any longer. I am anxious to have it settled in some shape. Waiting your reply, I remain, &c." Then a week after that he quitted the possession, and that is all we know, but we are left to infer that it was because the defendant had proposed nothing that he would agree to.

It would have been satisfactory if we had seen more



clearly on what understanding or footing the parties really were during this period of apparent suspense; that is, whether the plaintiff was understood by the defendant to be holding possession merely in the confidence that a private act of parliament would be obtained, and in what way the possession was at last changed.

All we have before us on that point is what was stated by the witness Henry Richardson, who swore that the plaintiff had engaged him to go and work for him in the mill, and that he went there on the *10th of July* for that purpose, when the plaintiff told him he was going to give up the mill to the defendant: that the plaintiff did on that day give up possession to the defendant, who then handed over the key of the mill to the witness Richardson, telling him to go in, and do the best he could for him, and that the witness did work the mill for the defendant for some months, and till he sold to Robertson, into whose service the witness entered.

This witness swore that the mill was a good one; that he did not understand from what the plaintiff said to him that he was willing to sink what he had paid, but did understand from him that he was willing to get out of the bargain as fast as he could.

It was left to the jury to say whether the evidence supported any of the pleas to the first count, the learned judge only expressing his own opinion to be that the tenth plea certainly was not proved.

The jury found that none of those pleas were proved, and gave a general verdict for the plaintiff for the £500, without interest, and also for the small account of £39, about which there was no dispute.

As to the sufficiency of the evidence to support an action on the common count for money had and received, that depended entirely on the view the jury took of the plaintiff's conduct. If after he knew of the objection he made a second payment, or gave his note for it, and continued in possession till the 10th of July (many months) to serve his own convenience, and not having then made up his mind to repudiate the contract, unless the difficulty about the road could be cleared up, the plaintiff could not afterwards, of

his own accord merely, throw up the possession, and as a matter of right demand back the money he had paid. This case would then fall within the principle maintained in *Hunt v. Silk* (5 East 449), *Blackburn v. Smith* (2 Ex. 783), *Reed v. Blandford* (2 Y. & S. 278), and other cases of that class.

But if the fact was, as I think the jury may from the evidence have concluded it to be, that the plaintiff, never having assented to waive the objection about the mill being in the allowance for road, nor induced the defendant to suppose that he had waived or would waive it, had only continued in possession in the confidence that the defendant would succeed in an effort he was making to obtain an act vesting the road allowance in himself or in the plaintiff, and if it was understood between him and the defendant that he was only remaining upon that footing, then I think that the defendant receiving afterwards from him the key of the mill, and for all that appears without remonstrance, and entering himself into possession, and using the mill and afterwards selling it, with the whole property, was bound to return the purchase money, and that the plaintiff could either recover it back in an action for money had and received, or might recover it in an action on the agreement, as part of the damages which he had sustained from the defendant having failed to do what he had undertaken.

No evidence was given as to whether the plaintiff, during the time that he was in possession of the mill, made the same free use of it as a person in possession as owner would ordinarily do, or whether he was merely keeping possession, and in a great measure suspending operations till he had received his title. Neither was it proved what would have been the fair value of his occupation of the different buildings from January to July. The driving-house and other house, which stood within the allowance for road, were sworn to be very rotten, and near tumbling down.

It would be rather singular if, when the plaintiff gave up possession, and the defendant received it, nothing was understood or talked of between them as to the return of the £500 which had been paid on account. If the plaintiff meant to

claim it, one would suppose he would have given a plainer indication of his intention, and that the defendant would have given him to understand either that he assented to his claim, or meant to resist it. But we have really no evidence upon the subject.

The jury might, as I have already said, either have given to the plaintiff his money back, on the count for money had and received, or might have given damages to that amount or more, or damages within that amount, for breach of the agreement which is declared upon the first count, according to the view which they took of the conduct and motives **of the parties**, and the spirit in which they had acted.

There are several points on which the case is obscure, as I have already noticed, and chiefly perhaps because the parties did not act, as it would seem, in an open manner towards each other, but allowed the time to run on without either giving to the other any clear intimation of what he expected or would insist on. This leaves it a case for the jury to deal with, when, if we could have seen more clearly the footing on which the parties were during the period from January to July, 1856, the court might have been able to determine explicitly whether the plaintiff had a right or not to claim back the purchase money paid, as so much money had and received to his use.

As the case stands on the evidence, I think it was open to the jury to take that view of the case which would warrant their giving back to the plaintiff the money he had paid, as being paid upon a consideration which had failed.

And at any rate, there is no doubt that upon the special count, if the evidence supported it, and if no plea was proved which was pleaded in bar, if it was open to the jury to give as damages the full amount of the money which the plaintiff had received; and I think upon the evidence given in the case, and the advantageous re-sale made by the defendant, it is by no means likely that another jury would in an action upon the agreement give a less amount of damages. The costs of the action the defendant must in any event pay, because he admits the small account sued upon of £39.

I think the agreement was correctly set out in substance,

and was proved ; and as to the pleas 2, 3, 4, 6, 7. 8, 9, 10, 11, 12, it was not proved that the defendant had the plaintiff's permission to give him the buildings only, without the land that they stood on, as pleaded in effect in the second plea.

It was proved that the plaintiff did pay the £550 referred to in the third plea, and that the second £250 was arranged by a note, in a manner approved of by the defendant.

It was not proved that the defendant did, on the 1st of January, or at any time, tender a free and satisfactory conveyance of the property mentioned in the agreement, as is pleaded in the sixth plea.

It is not a fair inference, I think, from the evidence, that the parties came to any such compromise or agreement as is stated in the seventh plea. When the plaintiff told the surveyor that if the defendant could not convey the old allowance for road it ought not to be included in the description, it is not reasonable to suppose that he meant any thing more than that it would be of no use to include it, as it would be merely making the defendant pretend to convey what he had no right to ; but he must then have relied on its being otherwise assured to him, and he seems to have been willing to wait a reasonable time in expectation of that.

The plaintiff did not abandon the agreement, or discharge the defendant from performing it, in the sense intended by the eighth plea.

The ninth plea was not proved, I think, for the two letters shew that the contract was not given up, on any other ground than because the defendant was unable to fulfil it. He might in time have been able to fulfil it, but he had broken it, and the plaintiff was not bound to wait any time, and certainly not an indefinite time, in the hope that the defendant might at some future day be able to perform it.

It may be quite true that the parties mutually agreed under the circumstances to rescind the contract, and that they came to some understanding as to what was to be done with regard to the return of the purchase money ; but if they did, they seem to have been at no pains to preserve evidence



of their understanding, or did not think proper to produce the evidence to the court and jury.

Of the tenth plea the learned judge took a right view, I think, at the trial. There was no new agreement proved after the first. What the surveyor stated in regard to the plaintiff's declaration to him that he had afterwards bought the saw-mill, and that that must be included in the conveyance, was no evidence of an agreement in which the first agreement could be looked upon as having merged. We do not hear what was to be paid for that, or how, or when; and at any rate it was a mere additional purchase, not anything that qualified or varied the terms of the main bargain.

I come, therefore, to the conclusion, that the case upon the pleadings and evidence was susceptible of that view which the jury seem to have taken of it, and according to which the plaintiff could in law and justice recover back what he had paid.

BURNS, J.—On the merits of the case as presented by these pleadings and the evidence, I see no ground for interfering with the verdict.

The case was simply this : The defendant agreed to sell to the plaintiff certain premises, of which he was to give the possession on the 1st of February, 1856. Part of the purchase money was to be paid on the 1st of January, 1856, £250, another part, £250, on the 1st of March, 1856, and the remainder in yearly payments. The title was to be made by the first of January, 1856. Possession of the premises was taken by the plaintiff, and the two sums of money, amounting to £500 were paid. A dispute arose about the title, and the defendant never completed it, but in July, 1856, received back possession of the premises, and the plaintiff left them, and the defendant subsequently sold the premises in October, 1856, for a larger sum than he had agreed to receive from the plaintiff.

The plaintiff contended that he was entitled to recover back the sum paid on account of the purchase money, together with damages for the trouble and inconvenience of

removing his family and goods away from the premises, and interest on the money so paid. The defendant at the trial contended that the plaintiff was not entitled to recover back any portion of the £500 so paid, because he, the plaintiff, was aware of the reason why the defendant could not give him a complete and perfect title to the whole of the land and buildings agreed to be sold, and that the objection raised by the plaintiff was not such a one as in fact he should have taken. So far as any of the pleas with the facts proved would afford any defence, the jury was asked to pronounce upon them, and they found for the plaintiff. The defendant now asks the court to interfere, and relieve him against the verdict, either by arresting the judgment, or granting a new trial on the ground that the damages are excessive. The jury have given the whole £500.

With regard to the point made for arresting the judgment, it is rested upon the defectiveness of the declaration. The declaration certainly might have been more artistically framed; but when we look at two statements contained in it, I think it is apparent the pleader had no idea that he was simply entitled to recover the money back on the ground that the defendant was not able to make a good title, but he rather seems to have supposed that the plaintiff was entitled to recover the money back on the ground that the contract between them had been rescinded, and that he was entitled to recover damages for taking away his family and his goods. The declaration states that, although the defendant allowed the plaintiff to continue in such possession for the space of three months, yet he would not make a good title, whereby the plaintiff lost and was deprived of the money so paid to the defendant, and the interest and enjoyment thereof, and also was put to and sustained great loss and inconvenience, in and about giving up possession, and removing his family and goods from the mill and property. The argument is, that the declaration does not shew a complete rescinding of the contract, and restoring of the parties to their first position, and that, for all that in truth appears, the plaintiff may be still in possession. If the declaration had contained the allegation that the plaintiff had given up the possession,

and the defendant had received it for the purpose of rescinding the contract, there could have been no question. Now what may be wanting in the declaration, it may be asked, is it not supplied by what is stated in the 9th plea? That plea is, that the plaintiff, after he had been in possession for six months, requested the defendant to take the premises off his hands, and then voluntarily gave up the same to the defendant, and then abandoned the premises and rescinded the contract, and then the defendant retook the possession of the premises at the request of the plaintiff. What the defendant complains of as wanting in the plaintiff's statement—namely, that for aught the declaration contains the plaintiff may be seeking to recover his money back, and still at the same time keep possession of the premises under the agreement—he has supplied by telling us that he himself retook possession. The motion to arrest the judgment must be determined by looking at all the record, not merely one statement.

Then with regard to the ground for a new trial, namely, that under the circumstances the plaintiff was not entitled to recover back the whole purchase money, but only damages that the plaintiff may have sustained by reason of the defendant not being able to make a perfect title of the whole of the premises; it appears to me that may depend upon the fact of whether the contract was rescinded by mutual consent or not. So far as restoring the parties to their former condition, that appears to have been done, and the defendant to have so far benefited that he sold the premises for a larger sum. The ninth plea raised the issue whether the plaintiff did not himself voluntarily abandon the contract, and the jury were told that if he did they should find for the defendant on that, but the jury found the other way. With respect to the amount to be recovered under the circumstances, the jury were told they might take into consideration that the plaintiff had occupied the premises, and they were to say whether it had been beneficial; at all events such occupation, would have been detrimental to the defendant.

The real question, so far as affected the defendant, was disposed of by the 9th plea, and if the declaration be defective, so as not to present the question to the court whether

the defendant assented to the rescinding of the contract, it is competent for the court to amend it now, and make it so. The plaintiff asks in the argument that the declaration may be amended, and that a new trial may be granted on that ground if necessary. That is not, however, necessary, as appears from *Parsons v. Alexander* (5 E. & B. 253). If the defendant assented to rescinding the contract, as the jury might infer from the evidence and the pleadings, then I do not think he is in a position to say he will keep the whole of the £500 paid to him. If both parties agree to rescind the contract, then it is just as if it had never existed, and the defendant in that case has received money of the plaintiff, for which he has in truth given no consideration.

MCLEAN, J., concurred.

Rule discharged (a).

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### BOULTON V. NOURSE.

*Insolvent—7 Vic., ch. 10—19 & 20 Vic., ch. 93.*

Defendant was a trader, within the 7 Vic., ch. 10, but first became so after the expiration of that act, and he became insolvent before the passing of 19 & 20 Vic., ch. 93.

*Held*, that he was clearly entitled to take the benefit of the latter act.

This was an action brought by the plaintiff against the defendant for the recovery of the amount of a promissory note made by the defendant to the plaintiff, for the sum of £45, dated 1st of June, 1850, and payable three months after date. And by the consent of the parties, and by the order of the Honourable Mr. Justice *McLean*, according to the Common Law Procedure Act, 1856, the following case was stated for the opinion of the court, without any pleadings:

“The defendant on the 30th of March, 1857, obtained from the judge of the County Court of the united counties of Northumberland and Durham a final order in insolvency, under the statute 8 Vic., ch. 48, extended by 20 & 21 Vic., ch. 93.

“It is admitted that the defendant was a trader within the meaning of the Bankrupt Act, 7 Vic., ch. 19, but first

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(a) See *Moses v. Macferlan*, 2 Burr, 1011; *Giles v. Edwards*, 7 T. R. 181; *Campbell v. Fleeming*, 3 N. & M. 834; *Farrer v. Nightingal*, 2 Esp. 639; *Cole v. Gibbons*, 3 P. Wms. 290; *Hitchcock v. Giddings*, 4 Price, 135.



became a trader after the expiration of that act, and became insolvent before the passing of the act 19 & 20 Vic., ch. 93.

"The question for the opinion of the court is, whether the defendant, as such trader, came within the description in the last mentioned act set forth, and so was entitled to avail himself of its benefits.

"If the court shall be of opinion in the negative, the judgment shall be entered up for the plaintiff for the amount of the said note and interest, and costs of suit. If the court shall be of opinion in the affirmative, then judgment of *non pros.*, with costs of defence, shall be entered up for the defendant."

*Eccles*, Q. C., for the plaintiff. *C. S. Patterson*, contra.

ROBINSON, C. J., delivered the judgment of the court.

The defendant it is admitted, first became a trader after the Bankrupt Act, 6 Vic., ch. 10, had expired, but while he was in business he was such a trader as would have come within the terms of that act, if it had then been in force. It is admitted also that he became insolvent before the passing of the act 19 & 20 Vic., ch. 93, and that on the 30th of March, 1857, he obtained a final order as an insolvent from the judge of the County Court, under the statute 8 Vic., ch. 48, extended by 19 & 20 Vic., ch. 93.

I cannot I confess, see any room for a question. The defendant having become a trader after the 7 Vic., ch. 10, expired, is clearly not against him, for the 19 & 20 Vic., ch. 93, expressly takes in such cases; then it must be admitted that he was insolvent before the 19 & 20 Vic., ch. 93, was passed, and still it is objected that he is disabled from obtaining a discharge under that statute. That statute, it is true, does apply in its operative words to such traders only as come within the preamble of it; and as the legislature were in great haste to repeal that act in the following session by 20 Vic., ch. 1, as being prejudicial to the public interest, we should not feel ourselves at liberty to extend the operation of the act to any case that does not come strictly within it.

Now the preamble of the chapter 93 runs thus: "Whereas there *are* many persons, who, having been traders in Upper Canada within the meaning of the statute 7 Vic., ch. 10, either

before or since the expiration thereof, *have become* insolvent, but by reason of such expiration *have been* unable to avail themselves of its benefits. All these persons are by the act enabled to avail themselves of the benefit of the insolvent act, 8 Vic., ch. 48.

As this defendant comes precisely within the preamble, I do not see where the question is. If he had become insolvent after the passing of the act 19 & 20 Vic., ch. 93, it might be objected that the act in its language applied only to past cases of insolvents; but having become insolvent before, the objection is precisely within the letter of the preamble, and therefore within the act.

Judgment *non pros.*, must be entered.

## WARREN V. GEORGE R. MUNROE AND ANDREW MUNROE.

*Covenant—Construction of—Running with the land—Pleading.*

Plaintiff conveyed to M. certain land, with the privilege of drawing off from the mill race on the adjoining land, which also belonged to the plaintiff, a certain quantity of water for purposes specified, leaving always sufficient to supply the mill on plaintiff's land. And by the same indenture M. covenanted for himself, his heirs, executors, administrators and assigns, that he, his heirs, executors, administrators or assigns, would restrict themselves to the use of the water for the purposes mentioned, and would not take such water unless there should be enough without it to supply the plaintiff's mill.

*Held*, that this was a covenant running with the land, on which the plaintiff might maintain an action against M's. assignees.

*Quære*, whether the first count of the declaration, set out below, could be treated as in covenant only, or might be taken as a count in tort.

The declaration charged, in the first count, that on the 8th of January, 1842, the plaintiff was possessed of lot 11, in the 2nd concession of Whitby, and of a flouring mill standing thereon, and of a mill race on the said lot supplying *water to the said mill*, and to a fulling mill and carding machine then in the possession of one Ethan Card, and was entitled to the flow of a stream of water through the said mill race on the said lot: that on the said 8th of January, by an indenture made by the plaintiff and his wife, and one Hugh Munroe, he, the plaintiff, for the consideration therein mentioned, gave, granted, bargained, and sold, &c., to the said Munroe, his heirs and assigns, a certain tract of the land, one quarter of an acre, part of the said lot 11, and did by

the same indenture grant, bargain, sell, &c., "to the said Hugh Monroe, his heir and assigns, the free, and uninterrupted use, right, privilege, and easement, of taking and drawing off into the said parcel or tract of land and premises, by means of a tight flume from the said mill race belonging to the plaintiff, and running through the said lot No. 11, along the east side of the said quarter of an acre of land, four inches square of water from the said mill race, for the purpose of driving a turning lathe, a grindstone, and a ripping saw, *and for no other purpose.*"

And that it was by the said indenture declared that the said privilege and easement, was granted upon the express condition that there should be sufficient water in the said mill race for supplying the said quantity to be drawn off as aforesaid, *after first supplying and driving the flour mill of the plaintiff* then supplied by the said mill race; and, secondly, after supplying and driving the carding machine, and fulling mill then in possession of Ethan Card, and supplied with water from the said mill race.

And that by the same indenture the said Hugh Munroe did for himself, his heirs, executors, administrators, and assigns, covenant with the plaintiff that he, the said Hugh Munroe, his heirs, executors, administrators, and assigns, should and would well and truly restrict themselves to the use of the quantity of water granted as aforesaid, for the purpose therein above mentioned and limited; that is to say, for the purpose of driving a turning-lathe, grindstone, and ripping-saw, and for no other purpose; and also that he and they should not require or take the use of the said quantity of water unless at such times as the said mill race should contain sufficient for the said purposes, after first supplying the flour mill of the plaintiff above mentioned; and, secondly, after supplying the fulling mill and carding machine also above mentioned.

The plaintiff then averred that after the making of the said indenture, and before the breach of covenant now complained of, all the estate, interest, &c., of the said Hugh Munroe of and in the said lands, and the said easement, by the said indenture conveyed, legally came by assignment

thereof to and vested in these defendants, whereupon the defendants entered into and upon the said lands and premises, and became possessed thereof, and continued so possessed from that time, &c.

And the plaintiff complained "that the defendants did not restrict themselves to the use of the quantity of water, granted as aforesaid for the purposes above mentioned, and in the said indenture limited, but after the said assignment used the said water *for other and different purposes*; that is to say, for the purpose of working a machine for planing iron, and for the purpose of working the bellows of a foundry: *and also*, after the said assignment, took the use of the said quantity of water at such times as the said mill race did not contain sufficient for the purposes in the said covenant specified, after first supplying the said flour mill of the plaintiff, and, secondly, after supplying the fulling mill, and carding machine also above mentioned.

In the second count the plaintiff set out that he was possessed of a mill, and by reason thereof was entitled to the flow of a stream, and that the defendants, by drawing off the water of the said stream by a flume for the use of the defendants, diverted the same from the plaintiff's mill; and he claimed £300 damages, and also a writ of injunction to restrain the defendants from continuing the said injury, &c.

The defendants pleaded—1st. Not guilty. 2nd. That they did what is complained of by the leave of the plaintiff.

At the trial, at Whitby, before *Hagarty, J.*, defendants' counsel objected that the covenant set out was not one that ran with the land, and that no action could lie against these defendants as assignees by reason of their breach of such covenant.

The learned judge reserved leave to them to move for a nonsuit upon that objection, and the jury found for the plaintiff, and 1s. damages.

*McMichael* obtained a rule *nisi* accordingly, and also to arrest judgment upon the first count.

*C. S. Patterson* shewed cause, and cited *Bally v. Wells*, 3 Wils. 25.

*M. C. Cameron* supported the rule.



ROBINSON, J. C., delivered the judgment of the court.

The case is not before us upon the merits, but only upon the legal exceptions. That the plaintiff had a right to recover some damage upon the evidence, if the legal objections taken should not prevent it, we must take to be conceded; and it does appear, we think, upon the facts proved at the trial, that the justice of the case is with him, for it appears that the defendants have used and are using the water which they take from the race way, for other purposes than those specified in the deed to Hugh Munroe, from whom they purchased; and it may also be contended that the evidence shews that the defendants have persisted in using the water at times when there was not enough left to supply the plaintiff's grist mill, as efficiently as it had been supplied before and up to the time of the easement being granted, to say nothing of the carding-machine, which has been since burnt down.

Then as to the legal question, whether an action can be sustained against the assignee of Hugh Munroe, it would seem most unreasonable if we should be obliged to hold that it did not, for surely, if the defendants claim to enjoy the privilege as his assignees they must take it with its restrictions. This, however, it may be said, would not necessarily establish that they are liable to damages under the covenant, but only that they might be treated as wrong-doers in diverting the water from the plaintiff's race way, for a purpose and to an extent which the deed under which they claim does not sanction. Of course, if that deed would not uphold their claim, and they have nothing else to support it, they would be left unprotected if the plaintiff was to sue them in the same kind of action as he would sue any stranger to that deed.

Whether the first count can properly be treated as a count in tort, or can only be taken as a count for breach of covenant, is a nice question, considering the latitude now given in pleading. If we must look upon it as in covenant only, I think we should have no difficulty in allowing the verdict to be entered on the other count, which would remove the difficulty, but in my opinion the action will lie upon the covenant against the defendants as assignees.

The case of *Bally v. Wells* (3 Wils. 25) cited by Mr. Patterson, is the same in principle, and in this case also the covenantor did by the deed expressly covenant for his assigns. The race way, it is recited in the deed, ran along one side of the land sold, and so, for all we can see, was, if not part of the thing demised or granted, closely connected with it; and at all events the privilege of using the water was part of the grant made by the deed, of which grant the defendants were assignees. The thing to be done also is upon the land granted; the assignees are expressly named; and the performance or non-performance of the covenant affects the mode of enjoying the land conveyed.

We are of opinion the rule should be discharged, both for non-suit and for arresting the judgment.

Rule discharged.

### FERRIER V. COLE.

*Distress for rent—Goods seized off the premises—Liability of landlord—Replevin.*

Defendant gave a warrant to a bailiff to distrain for rent on premises occupied by the plaintiff as his tenant, but the bailiff seized plaintiff's property off the premises. This was done without defendant's knowledge, and there was no evidence of his having adopted the act.

*Held*, that defendant was not liable, and that plaintiff could not maintain replevin against him.

REPLEVIN. *Plea*, not guilty, by statute.

At the trial, at Brantford, before *Burns J.*, the facts appeared to be these:—The plaintiff was tenant of the defendant on some premises situated a mile or so from the town of Brantford. On the 14th of November, 1856, the defendant made a warrant to a bailiff to distrain property upon the premises for \$115, rent claimed by the defendant as due on the 1st of November. The bailiff, instead of going to the premises to distrain, found the plaintiff in Brantford, with a waggon and a pair of horses, on some business. Finding the waggon and horses standing in the street, the bailiff thought it would be a very good opportunity for him to take them there, and save himself the trouble of going to the premises, and accordingly he seized them. The bailiff gave no information to the defendant of what he had done, and the plaintiff

immediately sued out a writ of replevin, and regained the possession of the waggon and horses. The defendant was not informed of the fact of seizure, or where the property had been seized, until after he was served with the writ of replevin.

Upon these facts the learned judge inclined to think the action not sustainable against the defendant, and thereupon the plaintiff took a nonsuit. Nothing was said about the pleadings, nor any discussion raised in consequence of the action being replevin.

*McMichael* obtained a rule to set aside the nonsuit, on the ground that the defendant was liable for the act of the bailiff, and the action sustainable against him. He referred to *Lewis v. Read*, 13 M. & W. 834; *Freeman v. Rosher*, 13 Q. B. 780.

*J. Duggan* shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

The declaration is not for distraining merely, but for taking, and under the 9th clause of the statute 14 & 15 Vic., ch. 64, on such a declaration whatever would constitute a legal defence if the action were trespass, will be equally a defence in replevin. This brings the case within the decision of *Freeman v. Rosher* (13 Q. B. 780).

And indeed, as a person may now always replevy where trespass would lie, if the circumstance of his bringing replevin instead of trespass or trover would have the effect of making a person liable for the taking who would not otherwise be, that would be a remedy always resorted to when there was any doubt about the ability of the bailiff to pay the damages; and in replevin, as in other actions, the costs are at stake, and ought not to be thrown upon a party who is not liable for the tortious act of taking, and who pleads that he is not guilty,

I was under an impression that a landlord employing a bailiff to distrain was liable for mistakes of the bailiff as to facts or law, though he would not be for his wanton or malicious acts, not done with a view to the execution of his warrant; and that he stood in much the same situation as a

sheriff, who is liable for the acts of his bailiff in such cases ; as, for instance, where the bailiff arrests A. by mistake, instead of B., or takes the goods of A. under an execution against B.; and this is on the principle that the sheriff, to whom the writ is directed, is liable for its correct execution, and if he chooses to employ an ignorant or incapable bailiff, who may often be not responsible in point of property, he must answer for what he does, however incorrectly, in the attempt to execute the process, or the person damnified would be often without remedy, for the plaintiff in the suit would clearly not be liable in such cases as I have mentioned.

The courts therefore have held, that from necessity the sheriff is treated in such cases as if he were present acting in his own person, because his deputing another is an act not necessary, but done for his own convenience. I was under the impression that a like principle extended to make the landlord liable in cases of distress, for he takes the law into his own hands for his own benefit, and should be careful that the person whom he deposes to act for him knows how to execute his authority. But from the cases to which Mr. *McMichael* candidly referred us, though they seem decisive against him, there seems to be no ground for a distinction between the landlord in such cases, and the plaintiff in a writ. Each is only liable for what he causes to be done, or adopts or ratifies afterwards. Here there was no evidence whatever of the landlord knowing before or at the time of an intention to seize the goods off the premises, or of their being so seized, nor that he afterwards in any manner adopted the act. The learned judge was therefore right in directing a nonsuit, and this rule must be discharged.

Rule discharged.

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#### BROWN V. ZIMMERMAN ET AL.

##### *Agreement—Construction of—Measurement by lineal feet.*

Where the plaintiff by writing agreed to furnish timber, to be paid for at a certain rate per foot, lineal measure. *Held*, that he was entitled to recover such price per lineal foot according to the length of each stick, not according to the length of a bridge constructed of the timber, and for which it was obtained.

APPEAL from the County Court of the County of Lambton.  
Assumpsit, on the common counts to recover the value of



squared timber and planking furnished by the plaintiff to the defendants.

The evidence in support of the plaintiff's case consisted of two agreements, by which the plaintiff agreed to furnish and deliver to the defendants the whole amount of timber and plank as specified upon the bills of timber annexed to the agreements, and the defendants agreed to pay him "eight cents a foot, lineal measure, for the aforesaid timber."

It appeared that a bridge five feet wide had been constructed of the timber, and that there were five pieces, each a foot wide, composing the bridge. The plaintiff contended that he was entitled under the agreement to recover eight cents a foot lineal measure, for each stick, while the defendants urged that he could claim only eight cents a foot, lineal measure, for the whole bridge. The learned judge charged in accordance with the view taken by defendants, who had paid into court a sufficient sum according to their construction of the agreement; but the jury found for the plaintiff, and a new trial being granted, the defendants appealed.

*D. B. Read* for the appeal.

*Crickmore* contra.

ROBINSON, C. J., delivered the judgment of the court.

We are all of opinion that the construction which the jury put upon the agreement in this case was the right one; or rather, perhaps, which may be a different question, that the construction of the learned judge was wrong; for it is not quite clear, upon the evidence and papers returned to us, what principle the jury were governed by in their measurement. But it is stated in the judgment, and seems not to be denied, that the verdict of the jury does not give too much to the plaintiff, unless the learned judge was right in applying the lineal measure to the length of the bridge, rather than to the timbers of which it was composed.

In one of the contracts, the defendant binds himself to pay "eight cents a foot, lineal measure, for the aforesaid timber," and by the other he agrees to pay ten cents a foot, lineal measure, for the timber specified in that agreement.

Surely nothing can be plainer than that. The timber to be furnished is specified in a schedule attached to each agreement. Among the descriptions we find three-inch plank mentioned, and as no distinction is made we can only suppose that that was meant to be measured as *timber* in common with the other, and as all was to be of white oak, eight or ten cents a foot was not an excessive average.

But, at any rate, nothing is said in the agreement about the lineal measure of any bridge that was to be made of the timber, nor indeed any allusion to the purpose for which the timber was wanted; and we do not therefore understand on what principle the lineal measure could be applied to the bridge, which might consist of two pieces laid side by side, or of twenty, and by such a measurement the amount to be paid to the person furnishing the timber would be in each case the same.

We reverse the judgment ordering the new trial, and direct that the verdict shall stand.

Appeal confirmed.

### MEYERS V. FRANCIS, O'REILLY, AND JUDD.

*Bond to the limits—Interim order for protection—Insolvents—Pleading—8 Vic. ch. 48.*

Action on bond to the limits against F., and his sureties. *Sixth plea*, that by an order made by the court for the relief of insolvent debtors, according to the statutes 8 Vic. ch. 48, and 19 & 20 Vic. ch. 93, the defendant F. was duly discharged from the cause of action for which the arrest took place. *Seventh plea*, that before the said F. departed from the limits and after his arrest and bail given, by an order of the said court, according to the statutes, an interim order for protection was given to him, which was in full force at the time of his departure as alleged. *Eighth plea*, that before the commencement of this suit a petition for protection of said F. was presented to W. S., judge of the county court, and filed in the insolvent court, and thereupon a final order for protection and distribution was made by said W. S., judge as aforesaid, duly authorized; and that the debt for which the attachment issued, on which F. was arrested, was contracted before the filing of said petition.

*Held*, on demurrer, pleas bad.

ACTION by the plaintiff, as assignee of the sheriff, on a bond to the limits, two of the defendants, O'Reilly and Judd, being sureties in the bond for defendant Francis, who had been arrested on an attachment for not performing an award.

*Sixth plea*, that by an order and adjudication made by the

court for the relief of insolvent debtors, according to the statute in that behalf made and passed for the relief of insolvent debtors of Upper Canada, in the eighth year of the reign of Her Majesty Queen Victoria, chapter forty-eight, and an act passed to extend the provisions of the said Insolvent Debtors' Act of Upper Canada, passed and assented to on the 1st of July, 1856, the said Robert Francis was duly discharged of and from the said cause of action and from the debts and costs ordered to be paid, and for which attachment issued, and upon which said Robert Francis had been arrested, and for which defendants had become bail.

*Seventh plea*, that before the said Robert Francis did depart from the limits of the gaol of the county of Hastings, as alleged, and after his said arrest and bail to the limits, by an order and adjudication made by the court for the relief of insolvent debtors, according to the said statutes, 8 Vic. ch. 48, and 19 & 20 Vic. ch. 93, an interim order for protection was given to the said Robert Francis from all processes whatever, either against his person or property of every description, and which interim order for protection was before and at the time the said Robert Francis did depart from the limits of the gaol of the county of Hastings, as alleged, and after his return thereto, in full force, not annulled or otherwise vacated.

*Eighth plea*, that after the contracting of the debt for which the attachment mentioned in the declaration issued, and on which the said Robert Francis was arrested, and gave bail to the limits as aforesaid, and before the commencement of this suit, to wit, on the 11th of November, 1856, a petition for protection of the aforesaid Robert Francis was duly, and according to the form of the statute in that case made and provided, presented to William Smart, Esquire, Judge of the County Court, and filed in the insolvent court; and that thereupon, afterwards, and before the commencement of this suit, to wit, on the 22nd of February, 1857, a final order for protection and distribution was made in the matter of the said petition, by the said William Smart, Esquire, Judge as aforesaid, duly authorized in that behalf, and that the said

debt for which said attachment issued, and every part thereof, was contracted before the date of the filing of the said petition in the said insolvent court.

*Demurrer* to each of these pleas.

*Walbridge*, Q.C., for the demurrer,] cited *Tatham v. Parker*, 17 Jur. 929.

*Henderson*, contra, cited Ch. Plg. III. 83; *Short v. McMullen*, 6 U. C. R. 407.

ROBINSON, C. J., delivered the judgment of the court.

The sixth plea is clearly no bar, for this reason, if for no other, that it does not shew that the discharge pleaded took place before the bond was forfeited. It is subject also, we think, to several other exceptions.

The seventh plea relies upon an interim order for protection, made by "the court for the relief of insolvent debtors," without saying of what county. There is no provincial court of that kind, and any such order of a county court judge should be shewn to have been made by the judge of the proper court. As the plea states it, it might have been made by the judge of any county in the province; but it is quite clear that they could not all of them have jurisdiction, but only the judge of that district in which the debtor had resided.

Here the interim order must have been made under the 11th clause of the act; but that only extends to prisoners in execution *upon judgments*. The language is express to that effect; and the protection would only extend to debts that have been mentioned in the schedule. And besides the insolvent would not, upon the making of the order, be entitled to depart from the limits, without obtaining the judge's order to the sheriff for his discharge.

The eighth plea is also insufficient for several reasons, but it is enough to say that it does not shew the final order to have been made before the departure from the limits, and it would be no bar against an action for the breach unless it was made before. This plea is liable also to many other fatal exceptions. The 29th, 30th, and 35th clauses of the act shew that what is stated in it could be no justification for



leaving the limits, even under an order of the judge of the proper county made to the sheriff, still less without any such order,

Judgment for plaintiff on demurrer.

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REID V. BALL ET AL.

*Excessive levy—Declaration—Pleading.*

*Held*, that the second count of the declaration set out below, charging defendants, as attorneys, with having entered judgment and levied on the plaintiff's goods for the full amount of a claim, without deducting a payment made; and the third count, charging a levy on other goods after enough had been seized, were both good in substance.

APPEAL from the county court of Oxford, upon a decision rendered on demurrer to the declaration.

The second count alleged "that one John McKay having on the 3rd of November, 1856, recovered a verdict at the assizes held in and for the county of Oxford, on the said 3rd of November, 1856, against the plaintiff, for £72 19s. 9½d. damages, in a certain action then depending in said court, and in which action the defendants were attorneys for the said John McKay, and the plaintiff shortly after the time of the rendering of the said verdict paid into the hands of one Daniel Gilbert Miller, for the defendants, as such attorneys as aforesaid, the sum of £75, for and on account of the said verdict and the costs of the said action with the knowledge and consent, and the request of and by the authority of defendants, and such payment having been made to the said Daniel Gilbert Miller, the defendant afterward entered judgment in the said action, and issued a writ of *feri facias* thereon, and without any reasonable or probable cause for so doing, wrongfully and maliciously endorsed the said writ to levy of the plaintiff's goods and chattels the full amount of the verdict and costs in the said action, and without allowing or deducting from the sum so endorsed the said sum of £75 so paid to the said Daniel Gilbert Miller by the plaintiff, the defendants then wrongfully and maliciously delivered the said writ to the sheriff of the county of Oxford to be executed, and then wrongfully and maliciously caused and procured the plaintiff's goods, to wit., four horses, four oxen, four

cows, two waggons, and other property of the plaintiff, of the value of the whole amount so indorsed on the said writ, to be seized and taken in execution upon the said writ, and to be kept and detained from the plaintiff for the space, to wit, of ten days; and the plaintiff was therefore put to great annoyance, damage and expense, and was obliged to find sureties, and to pay a large sum, to wit, £15 over and above what he otherwise would have paid, in order to release his said property from the said seizure."

The third count stated, "that after the seizure of the goods and chattels of the plaintiff in the last count mentioned, and after the execution of the said writ, and the seizure of sufficient of the plaintiff's goods, and chattels to satisfy the full amount indorsed on the said writ, together with the sheriff's fees and all incidental expenses, and while the same were in the custody of the sheriff of the county of Oxford on the said writ, the defendants wrongfully and maliciously, and well knowing the premises, and without any reasonable or probable cause for so doing, caused and procured other property to wit, two horses and one waggon of the plaintiff, of the value of, to wit, fifty pounds, to be seized in execution upon the said writ at another and different time and place, whereby the plaintiff was deprived of the use of his said property for the space of two days, and necessarily incurred great expenses, and the plaintiff was obliged to obtain securities to obtain the release of his said property, and was greatly annoyed and damnified. And the plaintiff claims fifty pounds."

The defendant demurred to each count, stating the following matters of law as intended to be argued. As to the second count—

1st. That it is not alleged that the judgment, execution, or levy, in the second count referred to, was ever set aside by the court in which it was entered; and the defendants contended that the facts stated in said count are such as (if true) to shew the said proceedings on said judgment to have been irregular; and if so, that such irregularity can only be declared such by the court in which such action was brought.

2nd. That no action will lie for an excessive levy.

3rd. That the allegations in the second count, that the acts were done wrongfully and maliciously, will not aid the same.

4th. There is no allegation of special damage, for it is not shewn that the goods which the sheriff seized were more than sufficient to satisfy the balance due.

And that the third count is bad in substance, for the several reasons assigned to the second count.

The following judgment was delivered in the court below.

*McQueen, J.*—With regard to the second and third counts, the causes of action in those counts appear to me to be sufficiently stated. *Churchill v. Siggers* (3 E. & B, 929) is an authority upon that point.

It is contended that there could be no legal injury to the plaintiff, and the judgment against him being regular, that no action will lie for taking proceedings upon it without first setting it aside.

It is laid down in the case cited, that to put into force the process of the law maliciously, and without any reasonable or probable cause, is wrongful, and if thereby another is prejudiced in property or person there is that conjunction of injury and loss which is the foundation of an action on the case. Between the case and the cause here complained of I can discern no distinction in principle. The proceedings in both being regular, and the judgments in force, it would not, as there stated, "be creditable to our jurisprudence if the debtor had no remedy by action, when his person or goods have been taken in execution for a larger sum than remained due on the judgment, this having been done by the creditor maliciously, and without any reasonable or probable cause."

The defendants appealed from this decision.

*Beard*, for the appeal, cited *DeMedina v. Grove*, 10 Q. B. 177; *Blanchenay v. Burt*, 4. Q. B. 707; *Marriot v. Hampton*, 7 T. R. 269; *Baker v. Ridgway*, 2 Bing. 41.

*D. G. Miller*, contra, cited *Locke v. Wilson*, 6 U. C. R. 600; *Ackland v. Adams*. 7 U. C. R. 139.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the second and third counts are good in substance, and that this appeal must be dismissed with costs.

Appeal dismissed.

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PURDY V. THE GRAND TRUNK RAILWAY COMPANY.

*Railway company—Trespass—Liability.*

J. & Co., had contracted with the Grand Trunk Railway Company to obtain the land required by them, and to construct their road; the line was laid out so as to cross the Bath macadamised road several times, which being considered dangerous the contractors agreed to make a new line for the road company, and in doing so they encroached upon the plaintiff's land.  
*Held*, that the railway company were not liable.

TRESPASS upon the plaintiff's close, being the north part of the west half of lot No. 7, in the 1st concession of Kingston.

*Plea*, not guilty, by statutes 14 & 15 Vic., ch. 51, sec. 20 and 16 Vic., ch. 37, sec. 2.

At the trial, at Kingston, before *Hagarty*, J., the facts appeared as follow:—The Bath road company had their macadamized road on the concession line bounding the plaintiff's lot. The Grand Trunk Railway company contracted for the construction of their railway with Messrs. Jackson, Peto & Co., who were to lay out the line subject to the company's approval, and were to acquire the land for the track at their own charge, and to take upon themselves the settlement of all difficulties with proprietors of lands along the line.

The contractors employed Mr. Rowan as their engineer, and the railway track was at first laid out in such a manner, owing to the nature of the surface, that it crossed and re-crossed the Bath road several times, which was complained of by the Bath Road Company as being dangerous and inconvenient to persons travelling on the road; and they took proceedings in consequence in the Court of Chancery to compel a change in the line of the railway. These proceedings were defended by the counsel for the contractors, Messrs. Jackson & Co., but at length a compromise was



entered into, and it was agreed that a surveyor should be employed by mutual consent to run a new line for the Bath Road Company, which should keep clear of the railway track: that the old Bath road should be abandoned; and that the contractors for the Grand Trunk Railway should make the new road for them upon the line that should be settled.

This was accordingly done. The plaintiff complained that it encroached upon his land, which it did to some extent, and that it passed in one point over a small piece of land, which he called a pleasure ground, and which for that reason could not be taken under the General Road Improvement Act, 16 Vic. ch. 190, against his will. He entered into an arbitration, however, with the Bath Road Company, and a sum of one hundred and fifty dollars was awarded to be paid to him, which the agent of the Grand Trunk Railway Company contractors offered to him, and left at his house, he declining to take it; but his brother who was present, took it up and retained it.

The evidence was contradictory as to whether the land which the plaintiff represented to be pleasure grounds was really such or not. The jury thought it was, and they gave 5s. damages.

The defendants' counsel moved for a nonsuit, objecting—1st. That the defendants were not liable for the injury complained of, but the Bath Road Company, if any wrong had been done. 2nd. That the defendants were at any rate not liable for the acts of the contractors, who made the road complained of upon the plaintiff's land, and not under the authority or by the direction of the defendants.

The learned judge thought that the defendants could not in any view of the subject be held liable for what was done, and he reserved leave to move for a nonsuit on the objections taken.

*Bell* obtained a rule *nisi* accordingly. He cited *Allen v. Hayward* 7 Q. B. 960; *Steel v. The South Eastern Railway Co.* 16 C. B. 550; *Angel & Ames on Corporations*, Secs. 311, 382; *Woodhill v. The Great Western Railway Co.*, 4 C.P. 449.

*McMichael* shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

If the defendants had taken the land for their railway, which they did not, they would have a legal right to take it, whether it was pleasure ground or not, and no action would have lain against them, but the plaintiff would have had his remedy for compensation under the arbitration clauses. But it was not taken by them, nor by any one for the purpose of their railway, but for the Bath Road Company, as a substitute for their old road, which it had been found necessary to abandon on account of the interference with it of the railway track.

The plaintiff, if he retains the money awarded for the value of this land as between him and the Bath Road Company, cannot in conscience claim a double compensation from them, or from any other party. If he has not received, or has not kept, directly or indirectly, the 150 dollars offered to him, and left in his brother's hands, still his first and clear remedy would have been against the person or persons who made the road over his land, and that was Mr. Rowan and the labourers or other persons employed by him; and if the plaintiff was not satisfied with that remedy, and desired to look to other parties, it could only be to the parties who set Mr. Rowan to make the road; namely, Messrs. Jackson & Co.; or the person who, by availing themselves of the road when made, might be held liable as having ratified and sanctioned this trespass, and that would be the Bath Road Company.

The evidence is very particular, and shews clearly how the thing was done, and we fully concur in the opinion of the learned judge at the trial, that there was no pretence for an action against the Railway Company, for they neither did the act complained of, nor gave directions to have it done, nor used nor enjoyed the road when made.

Rule absolute for nonsuit.

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## DUSOLME v. HAMILTON.

*Bail to the Sheriff—Waiver of special bail—Staying proceedings.*

The defendant in the original action having given bail to the sheriff, the plaintiff proceeded with the suit and obtained judgment. *Held*, that by so doing he had waived bail above, and that he could not afterwards take an assignment of the bail bond, and proceed against the bail.

See the judgment of the court in this case, in Hilary term last (15 U. C. R. 183), upon motion to enter a nonsuit, after a verdict for the plaintiff, where the facts are fully stated.

The court refused to make that rule absolute, for reasons given in the judgment, but they set aside the verdict upon an issue of fact, which had been improperly raised, and allowed the defendant to amend his pleadings, if he desired it, at the same time suggesting that he should consider whether the defence which he desired to set up was one that could avail him by being pleaded as a legal bar to the action, and whether his remedy was not rather by application to this court to stay proceedings on the bail bond, under the equitable jurisdiction given to the court in such cases.

*Crooks* now moved to stay proceedings, on the ground that the plaintiff, by proceeding in the original action against Christopher Columbus, thereby in law discharged this defendant, the bail to the sheriff.

*M. C. Cameron* shewed cause, and cited *Vernon v. Turley* 4 Dowl. 660.

ROBINSON, C. J., delivered the judgment of the court.

We feel that we are bound to make the rule absolute, notwithstanding the lateness of the application. It is utterly inconsistent with the intention of bail, and with the law and practice in such cases, that the plaintiff should be allowed, after declaring against the defendant in the original action, and proceeding to judgment against him as if he had appeared, to take an assignment of the bail bond, and proceed against the sheriff's bail as if the bond had been forfeited.

The plaintiff not only declared in the original action, but he carried on the proceedings and went to trial, before he took an assignment of the bail bond, and four days after he took the assignment he entered final judgment on his verdict.

The whole object of the bail bond was answered, for he treated the defendant as being regularly in court, and if it be true that the bail above was not put in regularly, still that has become immaterial, for the plaintiff by his proceeding waived bail above.

The case cited of *Vernon v. Turley* does not apply. The plaintiff there had only declared *de bene esse*, not in chief.

Rule absolute.

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CORBY ET AL. V. PATERSON ET AL. EXECUTORS.

*Bond to convey vessel—Special pleas—Release not alleged to be by deed—Pleading.*

Declaration on a bond, reciting an agreement to sell a vessel to the plaintiffs for a certain sum, payable by instalments, for which notes were to be given, and conditioned to convey said vessel within a specified time, and for quiet enjoyment. Breaches—Refusal to convey, and eviction of the plaintiffs by one G., alleging as special damage payment of costs in a replevin suit brought by G.

*Second plea*, to the first breach, that at the execution of the bond the boat, as the plaintiffs knew, was mortgaged to one C., to secure the same sums for which the notes were given, and payable at the same times; and thereupon, in consideration that the obligors would deliver the notes to C., in order that when paid by the plaintiffs the proceeds should be applied on the mortgage, and in consideration that the plaintiffs, would forbear to require the conveyance, C. agreed with the plaintiffs, with the consent of the obligors, to hold said mortgage only as a security for and until payment of said notes, and on such payment to release the said boat to the plaintiffs: that the obligors then, at the plaintiffs' request, and in pursuance of said agreement, transferred the notes to C., and the plaintiffs, thereupon discharged the obligors from procuring the conveyance.

*Third plea*, to the second breach, that after said agreement and transfer of the notes, C. transferred all his interest in the notes and mortgage to said G.: that one of the notes being unpaid, G. brought the action of replevin, and thus obtained possession, claiming under C.

*Held*, on demurrer, both pleas bad.

The plaintiff sued defendants as executors of one David Paterson, alleging in the declaration, in substance, that the said David Paterson and one James Cotton, one George B. Holland, and one Duncan MacDonnell, by their joint and several bond, became bound to the plaintiffs in the sum of £10,000, subject to certain condition, whereby—after reciting that the plaintiffs being desirous of purchasing the steamboat called the “City of Hamilton,” which was supposed to be owned by the firm of Donald Bethune and Company, had been in treaty with the said George B. Holland, the managing agent of the said firm in the absence of the said Donald Bethune, the general and managing partner



of the said firm, for the purchase of the said vessel, and that the obligors were limited or other partners of the said firm, and that under their advice, and with their consent, the said George B. Holland had agreed with the said plaintiffs for the sale to them of the said vessel for £6,000, payable as follows: £2,000 down, £1,000 on the 1st of December, 1854, £1,500 on the 1st of December, 1855, and £1,500 on the 1st of December, 1856, the last three payments to be secured by promissory notes, payable with interest at the times above mentioned, and that, owing to the absence of the said Donald Bethune, the title to the said boat could not then be legally conveyed to the said plaintiffs, but that it being the desire of all the said parties that the said sale should be closed at once, it has been agreed that the said sale should be at once completed, and the said vessel be delivered into the possession of the now plaintiffs, and that the said obligors should become bound to the now plaintiffs that a good and valid conveyance should be made of the said vessel, and a good and valid title to the same be given to the now plaintiffs by the parties legally entitled to convey the same, free from all claims and incumbrances whatsoever, within three calendar months from the date of those presents, and also to warrant and defend the now plaintiffs in the possession of the said vessel, from and against all legal or equitable claims and demands whatever, by or from any person or persons not claiming through or under the now plaintiffs, or any or either of them. And after reciting also that in pursuance of the said agreement the now plaintiffs, had paid the said sum of £2,000 to the said George B. Holland for the said firm and had also made their three several promissory notes bearing even date with the said writing obligatory, payable with interest, to the order of the said firm of Donald Bethune and Company, at the bank of British North America, Toronto, one for the sum of £1,000, payable on the 1st of December, 1854, one for £1,500, payable on the 1st of December, 1855, and one for the sum of £1,500, payable on the 1st of December, 1856; and that, in further pursuance of the said agreement,, full possession had been

or would be given of the said steamboat to the said plaintiffs at the time of the execution of those presents—it was declared that the condition of the said obligation was such, that if the said David Paterson, James Cotton, George B. Holland, and Duncan MacDonell, did and should, within three calendar months from the day of the date of the said writing obligatory, well and truly convey, or cause to be conveyed, by a good and valid deed and conveyance to the now plaintiffs, their executors, administrators and assigns, for ever, the said steamboat, and the absolute title to the same, free from all incumbrances, claims, &c., and so as that they should thenceforth stand and be absolutely possessed as of their own property of the said steamboat, free from all incumbrances, legal or equitable, save and except by the now plaintiffs, or any one claiming through them; and if the now plaintiffs should, from the making of that obligation, peaceably and quietly hold and enjoy the said steamboat, without the let, suit, &c., of or by any person lawfully claiming; and if the said David Paterson, James Cotton, George B. Holland, and Duncan MacDonell, their heirs, &c., should at all times thereafter warrant and defend the now plaintiffs in the full and free possession, and quiet enjoyment of the said steamboat, against all lawful claims and demands, then the said obligation should be void, otherwise should remain in full force.

First breach—That the said D. P., J. C., G. B. H., and D. M. did not nor would, nor did any or either of them, nor did nor would the defendants, or any or either of them, or any other person or persons, within the said three calendar months from the day of the date of the said writing obligatory, or at any time since, well and truly convey, or cause or procure to be conveyed, by a good and valid deed or conveyance to the now plaintiffs the said steamboat, free from incumbrances, or otherwise howsoever, although the said three calendar months had elapsed long before the commencement of this suit, but therein wholly failed and made default.

And the plaintiffs, for assigning a further breach of the said conditions of the said writing obligatory, according to the form of the statute in such case made and provided, further say,

that the plaintiffs did not nor could, at all times after the making of the said bond, peaceably and quietly enjoy the said steamboat, without the let, &c., of any person lawfully claiming the same, but on the contrary thereof, after the making of the said writing obligatory, and before the commencement of this suit, to wit, on, &c., one Overton Smith Gildersleeve took possession of the said steamboat while she was in the plaintiff's possession, and removed the plaintiffs therefrom by due process of law, and hath from thence hitherto excluded the plaintiffs; by reason whereof the plaintiffs have not only lost the use of the said vessel and the moneys expended by them upon her, but have also become liable for the costs of a certain action of replevin brought by the said Gildersleeve to obtain possession of said steamer, &c.

*Second plea*, to the first breach, that before the execution of the said bond the said steamboat, with its appurtenances, was to the knowledge of the plaintiffs mortgaged to the Honourable John Hillyard Cameron, or some person or persons as trustees for his benefit, and subject to his order and control, to secure the like sums, payable at the times and according to the tenor of the promissory notes in the said alleged bond mentioned; and thereupon, in consideration that the said David Paterson, deceased, in his lifetime, George B. Holland, James Cotton, and Duncan MacDonell, at the request of the plaintiff's, should deliver to the said John Hillyard Cameron the said promissory notes, in order that the proceeds thereof, when and as the same should from time to time be paid to him by the plaintiff's, should by him be applied in satisfaction of the said like sum secured by the said mortgage; and in consideration that the plaintiffs would forbear to require the execution of the deed or conveyance in the said declaration mentioned, he, the said John Hillyard Cameron, agreed with the plaintiffs, with the knowledge and assent of the said D. P., G. B. H., J. C., and D. M., that he, the said John Hillyard Cameron, or his said trustees, or his or their assigns, should hold the said mortgage only as a security for and until the payment by the plaintiffs of the said promissory notes, and should, upon such payment

being made, release to the plaintiffs the said steamboat, with the appurtenances ; and the said D. P., deceased, in his lifetime, and the said G. B. H., J. C., and D. M., thereupon, at the request of the plaintiff, and in pursuance of the said agreement, transferred the said promissory notes to the said John Hillyard Cameron, who thenceforth held the said mortgage to secure the payment thereof ; and the plaintiffs thereupon discharged the said D. P., deceased. G. B. H., J. C., and D. M., from procuring the said deed or conveyance of the said steamboat to be executed within the said period of three months by the parties legally entitled to convey the said steamboat and appurtenances, free from all claims and incumbrances, to the plaintiff, for which reason the said David Paterson, deceased in his lifetime, did not, nor did the said G. B. H., J. C., and C. M., within the said period of three calendar months, procure, nor have the said defendants since the death of the said David Paterson, procured the said steamboat and appurtenances to be conveyed to the plaintiffs by such valid deed or conveyance in the said supposed writing obligatory mentioned.

*Third plea*, to the second breach, that after the making of the said agreement, and the transfer of the said promissory notes in the said third plea mentioned to the said John Hillyard Cameron, he, the said John Hillyard Cameron, for valuable consideration, transferred his whole interest in the said mortgage, and in the said promissory notes and the said agreement to Overton Smith Gildersleeve, in the said declaration mentioned, and thereupon, while the said Overton Smith Gildersleeve was the holder of the said promissory notes and the assignee of the said mortgage and agreement as security for the said promissory notes, exactly in the same manner as the said Cameron held the same, the plaintiffs made default in the performance of the said agreement on their part, by the non-payment of one of the said promissory notes, according to the said agreement, and the said Overton Smith Gildersleeve thereupon brought the action of replevin in the said declaration mentioned, to enforce the performance of the said agreement by the payment of one of the said promissory notes, as he well might by reason of the said default of the plaintiffs to per-



form the said agreement on their part, which is the possession of the said steamboat by the said Overton Smith Gildersleeve in the said second breach referred to; and so the defendants say that the said Overton Smith Gildersleeve obtained possession of the said steamboat, claiming the same, or an equitable interest therein, by virtue of the said agreement so as aforesaid made by the plaintiffs with the said John H. Cameron and his assigns.

*Demurrer*—That the second plea sets up an agreement by parol inconsistent with the bond and condition declared on; that it does not shew any agreement by the plaintiffs that said Cameron should hold any mortgage as a security for the notes, or that the plaintiffs would release or discharge the obligors from procuring a conveyance of the vessel as required by the condition of the bond; that the said second plea does not shew when said alleged agreement was made, whether before or after the making of the bond, or whether it was under seal, in writing, or verbal; that the said plea does not shew how the plaintiffs discharged the obligors from procuring a conveyance.

That the third plea sets up an agreement by parol inconsistent with the bond and condition declared on; that it does not shew any agreement by the plaintiff that said Cameron should hold said mortgage as security for the notes, or that the obligors were not to protect the plaintiffs against the said mortgage: and said plea does not shew when said alleged agreement was made, whether before or after the making of the said bond, nor whether it was under seal, in writing, or verbal, and is inconsistent with the condition of said bond.

*S. Richards*, for the demurrer, cited *Sellers v. Bickford*, 1 Moore 460; *Flinn v. Calow* 1 M. & Gr. 589; *Harris v. Goodwyn*, 3 M. & Gr. 405; *McPherson v. Dickson*, 8 U. C. R. 40; *Williams v. Jones*, 5 B. & C. 108; *Besant v. Cross*, 15 Jur. 282; *Chitty on Contracts*, 4th Ed. 97, 99.

*Connor*, Q.C., contra.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the second plea is clearly bad, for the reasons assigned.

If the defendant would have us infer that such a discharge as he alleges arose by necessary implication from the arrangement between the obligors and Mr. Cameron, as he has described it, we could not take upon us to draw such inference, for no such consequence would by any means necessarily follow. On the contrary, the obligors might reasonably have relied upon their receiving a title to the boat according to the bond, for enabling them to raise the money for paying the notes by a profitable sale of the boat.

If the plea is to be taken as meaning to assert an actual discharge from the bond by agreement; in other words, a release; then, as that could only have been legally effected by deed, the defendants in their plea should have shewn that they were discharged by deed.

That was clearly required before the Common Law Procedure Act, and not less since that act, for the omission to shew that the discharge was under seal would have been bad on general demurrer.

The Common Law Procedure Act, indeed, in its schedule B. 38, shews an intention not to relax the principles of pleading quite so far as would be necessary to make this plea sufficient.

The third plea to the second breach is insufficient also, in our opinion for the same reason. The failure of the plaintiffs to pay their notes could never release the obligors from the bond sued on, unless it had been agreed under seal that such a consequence should follow; and the right of Mr. Gildersleeve to take possession under the mortgage in consequence of such alleged default of the plaintiffs, in not paying the money which would have gone to discharge it, cannot of itself, and without a stipulation to that effect by them under their seal, have had the effect of releasing the obligors from their bond.

It is in truth the same defence as is set up in the second plea, though in another form.

If the facts which the defendants means to rely upon would supply an equitable defence, they must be advanced in another manner.

This plea is framed upon the same principle as the plea which sets up as a defence to an action on a bond to indem-

nify, that if the plaintiff had been damnified it was of his own wrong; but that is a defence applicable to that peculiar description of bond; it applies only to the damage. It is inapplicable to an express condition to do a certain thing.

Judgment for plaintiffs, on demurrer.

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### CLEAVER V. CULLODEN.

*Building on land under contract of sale—Removal of to other land purchased from vendor—Conveyance of such land to defendant—Trove by vendor—Damages.*

The plaintiff contracted to sell a lot of land to A., who agreed to build a house upon it. A. put up the house, but the plaintiff refused to open certain streets, as he had agreed to do, and the lot was in consequence inaccessible. A. then assigned to defendant, who removed the house to another lot, which he also had agreed to purchase from the plaintiff; and after such removal the plaintiff executed a deed to defendant of this latter lot, with all buildings thereon.

*Held*, that notwithstanding the deed the plaintiff might maintain trover for the house so removed; but the jury having given only nominal damages, the court under the circumstances refused to interfere.

TROVER for a dwelling house and fixtures.

The facts of this case proved on the part of the plaintiff will be found reported in 14 U. C. R. 491, which was read as his evidence at the present trial, which took place at Hamilton, before *Burns, J.* The defendant then proved that he also was a purchaser from the plaintiff of a village lot at the same sale that Adams purchased his lot. Adams paid \$5 at the time of sale, and was to pay \$20 on the 1st of January, 1854, and \$20 on the 1st of January, 1855, for which he gave promissory notes. The plaintiff agreed to open streets upon the plot, and one of the streets was to pass the lot upon which Adams built the house in question. The plaintiff afterwards refused to open up the streets, and the consequence was that Adam's house stood enclosed in a field of the plaintiff's and constant squabbles occurred between the plaintiff and Adams about the fences. Adams put the fences down in order to get to his house, and the plaintiff and his family as often put them up again. After this had gone on for some time, Adams determined to sell his house to the defendant, in order that he might move it away from

that lot. In February, 1854, after the first payment of \$20 had become due, and not being paid, he sold both house and lot to the defendant for £68, and assigned the bond which he held from the plaintiff over to the defendant, and this was done in the presence of the plaintiff. The defendant assumed to pay the plaintiff the \$40 still due of the purchase money of the lot. The bond for a deed from the plaintiff, with the assignment of it, could not be found after search made. The defendant in October, 1854, moved the house from the Adams' lot to the lot which he himself had bought from the plaintiff, and there fitted it up and lived in it. There was a dispute between the plaintiff and defendant at the time of moving it, not because defendant was moving it, but because in doing so, in order to bring it from the Adams' lot to the defendant's lot, it necessarily crossed a piece of land belonging to the plaintiff. On the 23rd of October, 1864, after the house was moved upon the defendant's lot, the plaintiff executed to him a deed of bargain and sale for his lot, which, after describing it by metes and bounds, went on to say, "together with all houses, out-houses, buildings, &c., to the said parcel or tract of land, &c., belonging, or in anywise appertaining, &c., with the usual habendum.." The defendant contended that the effect of this conveyance was to destroy any right of action the plaintiff might have for the identical house in question.

The learned judge reserved leave to the defendant to move to enter a verdict for him, if the effect of the conveyance on this evidence was to transfer the house in question to the defendant, and destroy the plaintiff's right of action, and left the question to the jury upon the plaintiff's acquiescence in moving the house. The jury found for the plaintiff, and one shilling damages.

*Start* obtained a rule *nisi* to enter a verdict for defendant, according to the leave reserved; to which *Springer* shewed cause.

*Springer*, on the other hand, obtained a rule *nisi*, on the part of the plaintiff, to set aside the verdict, because the damages were too small, and on the ground of surprise.

This rule was not moved absolute.



ROBINSON, C. J., delivered the judgment of the court.

The deed given by the plaintiff to the defendant in 1854, of the lot to which the house in question had been removed, has at length been shewn to us, and we find that it does in the usual terms convey all houses, &c., on the lot conveyed; and it is also shewn by affidavits, which the defendant had leave to file, that the house was placed upon the lot which he had bought from the plaintiff before the conveyance was executed, and was standing there at the same time; but it is obvious, upon consideration, that the circumstances being shewn do not warrant us in determining in the defendant's favour, and for this reason: The house, when built by Adam's on the plaintiff's land, became part of the real estate, and was legally the property of Adams, as has been already decided by us between these parties. And it was evidently intended between those two that this should be so as is shewn by the stipulation in the writing between the plaintiff and Adams, that Adams should put up a house upon the lot which he had agreed to buy from him. If Adams had paid for the land and got a deed of it, then the house would have gone to him with the land; but the obvious meaning of the agreement was, that if he failed in paying the house would remain the property of the plaintiff, and be an indemnity to him for the disappointment. So that the contract between these parties, as well as by the principle of the common law, the house built by Adams, while it was standing on the plaintiff's land, was the plaintiff's property. That being so, when the defendant took upon himself to remove it from the plaintiff's land on which it stood, it became a chattel when separated from the plaintiff's freehold, and the removal of it by the defendant along the highway to his own lot, was a conversion of the plaintiff's chattels against his will, for which the plaintiff has a good right of action for such damages as a jury might think fit under the circumstances to give him; and this cause of action cannot be affected by the deed afterwards given by the plaintiff to the defendant.

The plaintiff had a right to recover, and he has a verdict only for nominal damages, which we have no ground for

setting aside at the instance of the defendant. We therefore discharge the defendant's rule.

The plaintiff, on his part, obtained last term a rule to shew cause why the verdict in his favour for 1s. should not be set aside for the smallness of the damages, contending that as the house was his he was entitled to recover its value.

He will use his discretion in pressing this application. It seems to us that there is but little chance of his rule being made absolute. If the defendant had made his payments for the lot, the house, which had been built entirely at his expense, would have become his, when he received the deed for the land. As he failed to pay, and let his purchase fall through, the house was in law the property of the plaintiff as part of the real estate; but the jury no doubt considered that if the agreement fell through, it was because the plaintiff persisted obstinately in keeping up the fences, and refusing to open the street as he had promised, without which the lot would be of little use to the defendant. This probably led them to give only nominal damages to the plaintiff.

Rule discharged.

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### SEXTON V. WOODS.

*Arbitration—Enlargement of time for making award—attempt to vary bond of submission by parol agreement—Pleading.*

*Declaration*, first count, that the defendant, by his bond, agreed that one C. should abide by the award of arbitrators, respecting certain matters referred to them in difference between C. and the plaintiff, provided the award should be made before the 6th of June then next; that the arbitrators, with the consent of C., of the defendant, and of the plaintiff, enlarged the time for making the award to the 1st of July, and made it on the 12th of June, alleging non-performance of such award.

*Second count*—That C. requested the plaintiff to extend the time, and the plaintiff, on such request, and in consideration that the defendant promised him to continue bound for the performance of such award, and that C. or the defendant would perform the same, agreed for the convenience of said defendant and C. that the time should be extended; setting out the award, &c., as in the first count.

*Held*, on demurrer, both counts bad.

The declaration, in substance, alleged that the defendant, on the 12th May, 1855, by his bond duly made and executed to the now plaintiff, under the penal sum of £500 agreed that one John Caldwell, who, by mutual bonds with the plaintiff, had referred certain matters to the

arbitration of the parties hereinafter mentioned, should submit to the award of John Prince, Archibald McKellar, and William Northwood, the parties named in the bond hereinbefore referred to, to arbitrate, &c., of and concerning all and all manner of actions, controversies, &c., then pending between him, the said John Caldwell, and the now plaintiff, provided the said award should be made on or before the 6th day of June then next ensuing, and should perform the requirements of the said award, in the event of the same being found against him by the said arbitrators, according to the form of the said award, or if the said thereby bounden now defendant should, in consideration of the premises referred to in the said bond of the defendant, and in consideration of five shillings then paid by the plaintiff to the defendant, do so for him, the said John Caldwell, provided the plaintiff took all steps in law to enforce the performance of the said award by the said John Caldwell, if the same should be found against him, by attachment only, then the said obligation should be void, otherwise in full force and effect: that the said arbitrators, on the sixth day of June aforesaid, at the request, and with the full consent and by the agreement of the said John Caldwell and of the defendant, who was his attorney in the said suit and reference, and with the consent of the plaintiff, enlarged the time for the making of the said award to enable the said John Caldwell and the defendant to obtain further evidence for his, the said John Caldwell's, defence, from the said last mentioned date until the first day of July then next following: that on the 12th day of the said month of June, the said arbitrators made their award in the said matters referred to them, in writing, under their hands and seals respectively, whereby they did award, that the sum of £378 18s. 5d. was due and owing from the said John Caldwell to the plaintiff, and that the said John Caldwell should pay the said sum to the plaintiff on the 24th day of July then next ensuing: that the said Caldwell did not pay at the time mentioned or since, although the plaintiff has taken all such steps in law to enforce the said award by attachment against the said John Caldwell, as he could do according to the practice of the

said Court of Common Pleas, nor has the said defendant done so for him, the said John Caldwell.

*Second count*, that the defendant having by his bond under his seal become bound to the plaintiff in the penal sum of £500, that one John Caldwell, between whom and the plaintiff certain differences had arisen, respecting certain sums of money due from the said John Caldwell to the plaintiff, should perform, fulfil and keep the award of John Prince, Archibald McKellar, and William Northwood, arbitrators indifferently chosen by and between them for settlement of the same, provided the award of the said arbitrators, or any two of them, should be made in writing, under the hand and seals of the said arbitrators, or any two of them, by the 6th of June, 1855, or that the said defendant should perform the said award for the said John Caldwell, requested the plaintiff, on the 18th of May, 1855, to extend the time for the making of the said award: and the plaintiff then, at the special instance and request of the defendant, and in consideration that the defendant then promised the plaintiff that he, the defendant, would be and continue bound for the performance of the said award, and that the said John Caldwell, or he, the said defendant, would perform the same, consented and agreed that the time for making the said award should, for the convenience of the said defendant and the said John Caldwell, be extended from the said sixth day of June to the first day of July in the year aforesaid. And thereupon the said arbitrators, after having maturely weighed and considered the matters in dispute between the said John Caldwell and the plaintiff, did afterwards, and within the said extended time, to wit, on the 12th of June, 1855, make and publish their award, under their hands and seals, of and concerning the premises, and did thereby award that the said Caldwell was indebted to the plaintiff in the sum of £378 18s. 4d., and that the said John Caldwell should pay the same to the plaintiff on the 27th of July, in the year aforesaid; and the plaintiff saith, that the said John Caldwell did not perform, fulfil and keep the said award, nor did the defendant do the same for him, and neither the said John Caldwell, nor the defendant,



although the same was demanded of them, hath paid the said sum of £378 18s. 5d., nor any part thereof, on the day when the same became due, or since to the plaintiff.

*Demurrer*, to the first count, that no sufficient enlargement of the time for making the award is shewn: that no valid award is shewn: that it is alleged that the said arbitrators enlarged the time, which they had no authority to do; and that the said first count shews no liability or undertaking of the defendant to pay any award made after the enlargement of the time by the said arbitrators.

*To the second count*, that the count alleges no promise, or facts from which a promise can be implied to have been made, by the defendant, nor any consideration for the making of a promise to pay the amount of the said award; and that the plaintiff relies upon parol alterations of the terms of an instrument under seal, and alleges no sufficient promise in writing to pay the debt of a third party.

*A. Crooks*, for the demurrer, cited *Gould v. Webb*, 1 Jur. N. S. 821; Jur. 1856, Leading Article, 440.

*Read*, contra, cited *Hurlburt v. Thomas*, 3 U. C. R. 258; *Hull v. Alway*, 4 O. S. 375.

ROBINSON, C. J., delivered the judgment of the court.

We think the second count is bad. It amounts to an attempt to alter the terms of a sealed instrument in a most material point by an alleged subsequent parol agreement. It is true that this count is not expressly founded on the bond, but the bond is set out in that count, and we are told in it that the defendant bound himself by it that Caldwell should keep any award that might be made between him and the plaintiff, *provided it should be made on or before the 6th of June, 1855*, or that the defendant would perform it for him; and then the plaintiff asserts that, at the defendant's request, he extended the time to the 1st of July following: that the arbitrators within that time made an award, that Caldwell should pay the plaintiff a certain sum, and that Caldwell has not paid it. It is not alleged that Caldwell, who was in the first instance to be bound by the award, consented to the time being enlarged. and without that this

defendant would be held liable as a surety for Caldwell's performance, when Caldwell himself would not be liable; but besides that, it is, as we said before, in truth an attempt to alter the terms of a written contract by an alleged verbal promise to do something different.

The case of *Hurlburt v. Thomas*, cited in the argument, (8 U. C. 258) does not apply, for it did not appear in that case, as it does here, that the first contract was in writing; and besides the plaintiff assumes that a parol agreement by the defendant, that Caldwell would fulfil any award to be made by a certain day between him and the plaintiff, would be binding, which we should like to see some authority for. It may be that there is such a consideration apparent on the declaration as would support such an agreement, though not under seal, but we much doubt it.

It is also fatal to this count that it contains no allegation that the plaintiff proceeded by attachment, and so endeavoured to compel Caldwell to perform the award. The enlarging the time, would not do away with that condition, for the alleged verbal engagement was only intelligible when taken in connection with the bond, and could not stand alone.

The first count has not that defect, but is bad on the other grounds.

And in no other count is it averred that the defendant made his promise upon any particular consideration, but only that he requested the plaintiff to enlarge the time, and the plaintiff consented. If that would supply a consideration for a promise, it should have stated that the promise was made upon that consideration, not that the counts would have been good even if there had been such a statement in them.

Judgment for defendant on demurrer.

#### REGINA V. HUBER.

Conviction by a magistrate for obstructing a highway, and order to pay a continuing fine until the removal of such obstruction—*Held*, bad.

In the matter of one Anthony Bross, convicted before Henry S. Huber, Esquire, a justice of the peace, of wrongfully obstructing a highway, upon the motion of *Freeman*

Q. C., a *certiorari* had been granted, upon which the conviction and warrant, with the information and evidence, were returned.

The warrant recited, that on the 18th of June, 1857, a complaint was made before him, Huber, one of the justices of the county of Waterloo, that Anthony Bross "did obstruct the Queen's highway:" that on the 20th of June Bross appeared before him, and thereupon, having considered the matter, the said A. B. was adjudged to pay £6 15s. for fine, and to pay to the constable £1 5s. 9d. costs, and that if those sums should not be paid on or before the 25th of July, 1857, the same should be levied of his goods.

Then the warrant recited, that the defendant had not paid the money on the 25th of July, and commanded the constable to make the money by distress and sale; and if no distress could be found, then to certify the same to him; dated the 28th of July, 1857.

The information stated only that "defendant A.B., of Little-Germany, in the township of Waterloo, &c., has obstructed the Queen's highway, by placing a rail fence thereon."

Jacob Borho, path-master, swore that defendant's fence was over the line, and in the road which Noah Bowerman, surveyor, had laid out as a public highway; and that as path-master he had ordered defendant to remove the fence, and clear the road, but that he had refused.

D. S. Shoemaker swore, that three years ago this road was brought before the council of Waterloo and investigated, and it was found that the road had been laid out twenty years: that defendant's house was on the road, and a by-law was passed within the last year allowing the house to stand, but if removed he was not to put another on the line of road.

The only conviction returned was this:

"This case having been examined, it was ordered that the defendant, A.B., should pay a fine of ten shillings, currency, for the obstruction of the highway, and £1 5s. 9d. costs, and to remove the fence within one week; and in the event of not complying therewith "an additional fine of five dollars for every week the said fence should obstruct the road should be imposed:" dated 20th of June, 1857.

By a memorandum on the conviction it was shewn that £6 5s. was to be levied for delaying till the 25th of July to remove the fence.

ROBINSON, C. J., delivered the judgment of the court.

No cause has been shewn against the application to set aside this conviction, and it is certain that it cannot be supported. It wants in truth almost every essential of a conviction, and the adjudging a continuing fine of five dollars a week, in case of failure to remove the nuisance, has nothing to warrant it in any act of parliament referred to, or that we are aware of.

We were asked to consider whether the warrant to levy also should not be set aside, but we find no necessity for that, if we could regularly do so upon this writ and return.

Rule absolute to quash the conviction.

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### GLICK V. DAVIDSON.

*Commission for taking affidavits issued for a district—Effect of, after division into counties—12 Vic., ch. 78, secs. 18, 37.*

K. held a commission for taking affidavits in the district of Wellington, issued in 1848. *Held* that he might act under such commission in the county of Waterloo, where he was living, being part of the old district of Wellington, and a junior county disunited from the union of Wellington, Waterloo, and Grey.

*Quære*, whether the want of authority in the commissioner taking the affidavit of debt, can be set up by the sheriff as a defence to an action for escape.

APPEAL from the county court of the county of Waterloo.

This was an action against the defendant, as sheriff, for allowing one B., who had been arrested on mesne process, to escape, and falsely returning *non est inventus*.

The declaration alleged that the affidavit on which the writ issued was sworn at Galt, in the county of Waterloo, in October, 1854, before Otto Klotz, then being a commissioner for taking affidavits in the court of Queen's Bench in and for the county of Waterloo, and that one James Davidson, then and there being also a commissioner duly appointed for taking affidavits in Her Majesty's court of Queen's Bench, in



and for the county of Waterloo, duly issued the writ of *capias*.

Defendant pleaded, among other pleas, that Otto Klotz is not nor was a commissioner duly appointed for taking affidavits in the court of Queen's Bench, in and for the county of Waterloo, as alleged.

At the trial it appeared that Mr. Otto Klotz was a commissioner for taking affidavits in the Queen's Bench for the district of Wellington under a commission issued in 1848, which was the only one that he had received. Wellington and Waterloo were separated in 1852 or 1853, Wellington being the senior county.

Mr. James Davidson, who issued the writs, stated that he was a commissioner for the united counties of Wellington, Waterloo, and Grey, and that at the time of issuing the writ Waterloo was separated from Wellington and Grey, and he was residing at Galt.

It was objected that the affidavit to hold to bail was not made before a commissioner for the county of Waterloo, a junior county; nor was the writ of *capias* issued by a duly appointed commissioner for the county of Waterloo; and that consequently the action must fail.

The jury found for the plaintiff. and a rule *nisi* having been obtained for a new trial, was afterwards made absolute.

From this decision the plaintiff appealed.

*Eccles*, Q. C., for the appellant, cited *Nightingale v. Wilcoxson*, 4 Bing. 201, 10 B. & C. 202, S. C.

ROBINSON, C. J., delivered the judgment of the court.

Mr. Klotz, who swore the plaintiff to this affidavit of debt, had no commission to take affidavits of a latter date than one issued to him in 1848, which was for the district of Wellington. He took the affidavit in the county of Waterloo in October, 1855, which was a junior county, disunited from the union of Wellington, Waterloo and Grey, Wellington being the senior county, as being the one in which the gaol and court house had been.

Mr. Klotz took the affidavit in the county of Waterloo, in which he was then living and the 27th clause of 12 Vic.,

ch. 78 gave him a continuing authority to act for the united counties, to which the processes of the former district of Wellington were transferred under the act, as if he had held a commission for those counties specifically.

The 18th section of the same act provides that in case of a junior county (as in this case Waterloo) being disunited from a senior county (in this case Wellington), none of the officers in the senior county shall as such have any jurisdiction in the junior county when disunited.

That however was not this case. The commissioner in this case, M. Klotz, was not as a commissioner for Wellington assuming to act as a commissioner for Waterloo; but being a commissioner under his commission of 1848 he continued to act as commissioner for Waterloo, being that part of the former district of Wellington in which he resided. We do not see anything wrong in that.

We do not understand from the evidence that Mr. Davidson, the commissioner who issued the writ, stood in any different situation.

But if in fact neither of these commissioners had authority to do that act which he did, we do not think that any plea but the fourth admits the objection, and that is only as to the commissioner who swore the plaintiff to the affidavit, and that issue was found in favour of the plaintiff, if Mr. Klotz had authority under his commission, as we think he had, to act for the county of Waterloo.

We are therefore of opinion that the plaintiff was entitled to keep his verdict, independently of any question, which indeed is not open upon the issue of fact, whether the sheriff could set up such a defence, having arrested a party upon a writ valid upon the face of it, and not being bound to inform himself whether Mr. Klotz had a proper commission. Before he could ascertain that fact, the defendant might in many cases get beyond his jurisdiction.

We think the rule granting a new trial should be set aside and the verdict be allowed to stand.

Appeal confirmed.

## BELL V. PEEL.

*Fraudulent assignment—Concurrence of plaintiff therein—Estoppel.*

Defendant went to England, leaving A., an agent on his farm, who purchased corn from the plaintiff for the purpose of feeding defendant's cattle. Executions were issued against defendant; and A., to protect the cattle, made a bill of sale of them to the plaintiff, as if to pay the sum due him for costs, but gave at the same time an undertaking that he would pay pasturage for them at the usual rates; and when the bailiff came to seize the plaintiff claimed the cattle as his own. He afterwards sued defendant for the pasturage. Defendant pleaded delivery and acceptance of the cattle in satisfaction, and the jury found in his favour.

*Held*, that the verdict was right, for the plaintiff having concurred in the fraud by holding out the cattle as his own, could not afterwards claim for feeding them.

ASSUMPSIT, on common counts, one for agistment of cattle. *Pleas*—1. Non-assumpsit. 2. Delivery and acceptance of cattle in satisfaction of all the demands sued on. The trial took place at Sandwich, before *Hagarty, J.*, when a verdict was found for defendant.

*Prince* moved for a new trial, on law and evidence, and for misdirection.

The facts of the case are stated in the judgment of the court, delivered by

ROBINSON, C. J.—We see no good ground for a rule. The plaintiff urges a claim against the defendant for hay and oats furnished to him, and for feeding his cattle. The defendant who had been living near Amherstburgh, went to England, leaving one Allison, an agent on his farm, and leaving a number of cattle without means of feeding them, Allison got corn and hay from the plaintiff to the amount of \$202.

Peel owed debts, and there were attachments and executions out against him. To shelter the cattle against these writs, Allison made a bill of sale of them to the plaintiff at certain prices, as if to pay the \$202 due, but gave an undertaking to the plaintiff that he *would pay him pasturage for them* at the usual rates, if he could sell them for more money, and pay his debt.

It was proved by Allison, who was called for the plaintiff, that this was done to protect the cattle, and it was also proved that the plaintiff asserted them to be his when the bailiff came to seize them.

The defendant, by pleading accord and satisfaction, acquiesces in the sale made by his agent: and the plaintiff fully concurred in giving it the appearance of a sale for a fraudulent purpose.

The plaintiff has acknowledged himself paid the \$202, by taking the cattle as for that sum; and if the cattle were his, he cannot charge afterwards for feeding them.

We think the jury found rightly for the defendant. As to the pasturage of an animal which was apparently not among those fraudulently pretended to be assigned, the learned judge told the jury he saw no reason why the plaintiff might not recover the charges for pasturing it; but the jury treated the whole as a fraudulent claim, and allowed none of it. There was no misdirection. If the plaintiff had claimed only this small sum as being due to him, he would probably have been paid it. We do not think in such a case we should interfere on his behalf.

It is curious that we have no account of what became of the cattle.

Rule refused. (a)

## DETLOK V. THE GRAND TRUNK RAILWAY COMPANY,

*Railway company—Right of tenant for life to compensation—Action brought too late—Arbitration—Estoppel.*

The Grand Trunk Railway passed through certain land, of which C. was owner and the plaintiff a tenant for years. In 1853 an arbitration was held to determine the sum to be paid to C., and the plaintiff being appointed arbitrator on his behalf, concurred in making an award, saying nothing then of any claim on his own part; but in 1855, more than six months after the company had taken possession of the land, he brought trespass against them.

*Held*, that the action would not lie for, *first*, if maintainable, it was brought too late, and *secondly*, his remedy, if any, was by arbitration.

*Quære*, whether the arbitration clauses of 14 & 15 Vic., ch. 51, extend to tenants for years.

*Semble*, that the plaintiff, by his conduct, had estopped himself from making any claim against the company.

The suit was commenced on the 16th of September, 1856.

At the trial, at Kingston, before *Hagarty*, J., the facts appeared as follow:

The land taken belonged to the late Mr. Cartwright's

(a) This case was decided in Easter term, 1856, but was omitted in the reports of that term.—See *Cinq Mars v Moody*, post, page 601.



estate, and the plaintiff had a lease of it from the 1st of December, 1850, for nine years.

The land leased was sixty-six acres. The railway passed through it, and there was a station upon it. The company occupied nine acres, and their track separated one part of the land from the other.

At the time the contractors entered upon the land the plaintiff was in possession, and he had remained so still.

In 1853 there was an arbitration between the company and Mr. Cartwright's representatives, to estimate the compensation to be paid by the company for the fee in the land taken. This plaintiff was one of the arbitrators chosen on the part of the estate, and attended, and joined in the award, which was, that £15 an acre should be paid for one part of the land, which was specified, and for the rest £10 an acre, the quantity being not more than ten acres, and some of it was to be used by the company for other purposes than for their railway.

The plaintiff said nothing of his having himself any interest in the land, and gave no intimation of his having any claim for compensation. The arbitrators only valued the estate of the owner of the fee, knowing of no other interest.

The plaintiff first advanced a claim on his own account in June, 1855, which was about the time the company were taking possession.

A verdict was taken for the plaintiff, and £30 damages, subject to the opinion of the court.

*Phillpotts*, for the plaintiff, cited *Shelford on Railways* 375-7 ; 14 & 15 Vic., ch. 51, sec. 20.

*Bell*, contra, cited *Cameron v. Ontario, Simcoe, &c., Railway Co.*, 14 U. C. R. 612 ; *Thomas v. Cook*, 2 B. & Al. 119 ; *Walker v. Richardson*, 2 M. & W. 882 ; *Nickells v. Atherstone*, 10 Q. B. 944 ; *Pickard v. Sears*, 6 A. & E. 469.

ROBINSON, C. J., delivered the judgment of the court.

If an action would lie at the suit of the plaintiff, under the circumstances, the first question is, was it brought in time under the 14 & 15 Vic., ch. 51, sec. 20. We think it was not, for the entry and expulsion complained of are acts

completed at the moment they are done ; no second action could be brought after a recovery for such injuries.

It is not like cases of consequential damage, by backing water upon land, where damages cannot be given in an action, either for the value of the land, or prospectively for damages not yet sustained.

The whole injury was sustained when the defendants entered and took possession of the land, and put out the plaintiff, for there was no reason to imagine that the land thus taken would come again into the plaintiff's possession. The plaintiff well knew, from his agency in the matter, that the company had acquired and been made to pay for the whole interest in the land, as if there was nothing to impede, or qualify, or encumber their enjoyment of it ; and that, if any injury was done to him in the matter, it was final. It was incumbent on him therefore to bring any action that he could bring against the company within six months.

We think also that he could bring no action for being deprived of his possessory right as tenant, for that the company had undoubtedly by law a right to dispossess both the owner and his tenants of land necessary for their railway. The entry and expulsion therefore was no trespass, and not an unlawful act, for the statute allowed it ; and the only question is, whether the legislature have provided compensation. If they have not, then the defendants are not liable to pay damages. If they have given compensation, it is only through the arbitration clauses, and the plaintiff would have that remedy or none for acts not wrongfully done.

The General Railway Clauses do not very clearly provide for the case of tenants for years, and there is room perhaps for a doubt whether the Arbitration Clauses apply to them. The fifth sub-section of the eleventh clause may be insisted upon as extending to them, but it is not clear. On that point we refer to the case of *The Queen v. Manchester, &c., Railway Co.* (4 Ell. & Bl. 88), and to *The King v. The Liverpool and Manchester Railway Co.* (4 A. & E. 650).

In my opinion, if there were not these difficulties in the plaintiff's way, he would have found it not an easy matter to establish a claim against the company in the face of the

facts proved, for having himself given an award against the company as a compensation for the extra interest in the land they were taking, and which he knew they had every reason to suppose would entitle them to possess it without molestation, he could hardly be allowed, a year or two after they had constructed their work upon it, to produce for the first time a claim on his own behalf as a tenant for years under the Cartwright estate.

The general issue by statute would let defendants into every matter of defence ; and some of the cases cited by Mr. Bell, particularly *Nickells v. Atherstone* (10 Q. B. 944) are strongly opposed to his being permitted, after the part taken by him, to assert a continuing tenancy in himself as a foundation of a claim against the company.

Judgment for defendants..

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### ROSS ET AL. V. JONES.

#### *Bail Bond—Joint and several liability.*

On a joint and several recognizance of bail, one of the cognizers may be sued alone.

A plea that defendant was jointly bound, means that his undertaking was joint only, not several.

The plaintiffs sued in debt, on a recognizance of bail.

The declaration set forth that the defendant, on the 23rd of May, 1856, as of Hilary Term, 19th Victoria, at Toronto, came in his proper person before a commissioner, &c., of the united counties of York and Peel, and became bail for one John Brooks, in an action in the Common Pleas, at the suit of these plaintiff's—setting out the condition in the common form, and as if the undertaking was entered into by this defendant Jones alone. The judgment against Brooks was then set out, and that he did not render himself, &c., “whereby an action hath accrued to the plaintiff to demand and have from the defendant the sum of £506 4s.”

The defendant pleaded that the recognizance in the declaration mentioned was entered into by the defendant *jointly* with one Moses Gamble, not by the defendant alone: that Gamble did at the commencement of the suit reside, and does now reside in Upper Canada, to wit, in the township of King.

At the trial, at Toronto, before *Robinson, C. J.*, an exemplification of the recognizance roll was produced. The original action of these plaintiffs was against John Brooks and Alexander Jones, and the recognizance stated that John Brooks came before the commissioner by his attorney, and thereupon came also Moses Gamble, of &c., and Alexander Jones, of, &c.," and became pledge and bail, and each of them by himself became pledge and bail, for the said John Brooks, that if it shall happen that the said John Brooks shall be convicted in the said action, &c., then the said bail consent, and each of them for himself consents, that all such damages as shall be adjudged to the said plaintiffs shall be made of their, and each of their lands and chattels, if it shall happen that the said John Brooks shall not pay the said damages, or render himself," &c.

It was admitted that Moses Gamble did, at the commencement of the suit, and does now reside in Upper Canada.

A verdict was entered by consent for the plaintiffs, with leave to the defendant to move to enter a verdict for him on the issue, upon the ground that the recognizance was entered into by him *jointly* with Moses Gamble, as pleaded, and not severally.

*Eccles, Q. C.* obtained a rule *nisi*, according to the leave reserved, to enter a verdict for defendant, on the ground that he proved his plea. He relied on the case of *Mills v. McBride*, 10 U. C. R. 145.

*J. R. Jones* shewed cause, and cited *city of Toronto v Shields*, 8 U. C. R. 133.

ROBINSON, C. J.—I do not see that the case of *Mills v. McBride* is an authority in favour of the plaintiff. In that case the recognizance was set out in the declaration as the joint recognizance of the defendant and two others, and yet the defendant was sued upon it alone. One of two contract ors may be sued alone under our statute. and this was done under the assumption that our joint obligor act applied in such a case as in others. Upon the authorities, and for the reasons stated by us, we thought that in action of debt on a recognizance, which is matter of record, as well as in



a proceeding by *sci. fa.* on the recognizance, one of two or more *joint cognizors* cannot be sued alone, without accounting for the non-joinder of the other. Undoubtedly, that would be so in all cases, unless for the statute, and must still be so therefore in cases to which the statute does not apply.

But this is neither the case or a plaintiff proceeding in an action of debt against one of two of more *joint cognizors*, nor of a plaintiff proceeding against more than one, but not against all of several cognizors, who are jointly and severally bound, which clearly the law would not allow. It is the case of a plaintiff proceeding against *one only* of two cognizors who are *jointly* and *severally* bound, and we see nothing in the case referred to, or in any other case, which assumes that to be illegal, while the authority of 2 Saunders 72 *a*, note 4, is expressly in favour of it.

To hold that the plaintiff could not maintain his action against *one* of two cognizors, who are jointly and *severally* bound, would be to hold that there is in such cases no difference between a joint and several undertaking.

It cannot be said that the defendant proved his plea, because he avers in that that he was *jointly* bound in the recognizance with one Moses Gamble, which implies that his was strictly a joint undertaking with Gamble, and that he was not otherwise bound. Holding the law to be as I have stated, we must hold the defendant to mean that by his plea, otherwise it would be no bar and as the language is fairly susceptible of that construction, we must take the plea to be pleaded in that sense; that is, denying that he was severally bound.

We think the rule must be discharged. There can be no difficulty created by such a circumstance having occurred as was stated in the argument, namely, that the other bail has surrendered the debtor, for if that should disable the plaintiff from pursuing his remedy upon the recognizance, the defendant must avail himself of the objection in the proper manner.

MCLEAN, J.—That several actions can be sustained on a recognizance which is joint and several in its terms, is shewn

in the case of *Vansandau et al. v. Nash* (10 Bing. 329) and 2 Saunders 72 *a*, note, in which it is said the plaintiff is at liberty either to bring one action of debt against all the persons bound in the recognizance, or several actions against each of them; but one *scire facias* is sufficient, because the recognizance upon which the *sci. fa.* is founded being joint and several, and the purport of it being to have execution according to the form and effect of the recognizance, it therefore follows that though the *sci. fa.* be joint the execution may be several.

In the case in 10 Bing. 329, to which reference is made, the court held that bail jointly were liable only for the amount specified in the recognizance as the undertaking of each, and not for the sums so specified jointly, and the order was made to stay proceedings on payment of the sum for which each became liable, and the costs. Whether the defendant in this case can claim a stay of proceedings on the same, or any other ground, must depend upon the circumstances, but he cannot be relieved on the ground that the action will not lie against him upon his several recognizance.

Rule discharged.

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### D'ESTE CINQMARS V. MOODIE (SHERIFF).

*Fraud—Concurrence of defendant—New trial refused—Appeal.*

Charles and Peter CinqMars, carrying on business at Belleville, being indebted to B. & Co. for goods, executed to them a confession of judgment. Other creditors pressing, an execution was issued on this confession, and an arrangement made that the goods should be sold by the sheriff; that a brother of C. & P. CinqMars, a minor, should buy them in, and the execution debtors receive credit for the proceeds, and that the business should be carried on by him and C. CinqMars, the goods remaining in his name as ostensible owner. Peter CinqMars lived in Montreal. Afterwards the plaintiff packed up the goods, and being about to send them to his brother in Montreal, they were seized and sold by B. & Co., as the property of C. CinqMars. For this the plaintiff sued; and the jury having twice found in his favour,

*Held*, that although it seemed clear that the plaintiff had never in fact purchased or paid for the goods, but had been set up as a purchaser merely to protect them from other creditors, yet as B. & Co. had concurred in holding him out in a false character, the court should not interfere.

An appeal will not lie in such a case. See note, page 610.

TROVER for goods seized and sold by defendant as sheriff of the county of Hastings.

Pleas—1. Plaintiff not possessed. 2. Justification under

a *fi. fa.* against Charles N. CinqMars and his brother Peter J. M. CinqMars, in favour of James Brown, Archibald Swan, and Andrew Robertson.

At the trial, at Belleville, before *McLean, J.*, it was proved that Charles N. CinqMars and his brother Peter J. M. CinqMars entered into business as co-partners at Belleville in carrying on a clothing establishment. That while so engaged, the firm of Brown, Swan & Co., at Montreal, advanced them goods to a large amount, and that they also received credits to a considerable amount from other parties. After the establishment of the business at Belleville, P. J. M. CinqMars carried on business at Montreal and incurred debts there.

The building in which the business at Belleville was conducted was burnt down on the 24th of May, 1854, and some of the goods destroyed. One of the firm of Brown, Swan & Co. immediately after the fire, came from Montreal to Belleville, and considering their large claim against CinqMars and Brothers in danger, Charles N. CinqMars, in charge of the business, executed a confession of judgment on behalf of himself and partner in their favour for the amount of their debt, and at the same time made an assignment of the policy of insurance on the shop and goods. As other creditors were pressing, a judgment was entered on the cognovit, and execution issued, under which the goods remaining were seized by the sheriff and advertised to be sold. To assist Charles N. CinqMars in carrying on the business, it was arranged that the goods should be sold by the sheriff, and that CinqMars and Brother should receive credit for the proceeds: that the goods should be bought in and continue in the store in the name of the plaintiff as the ostensible owner, and that more goods should be advanced by Brown, Swan & Co., the better to enable the business to be carried on under a new firm of CinqMars & Co. The goods were accordingly put up for sale by the sheriff, and according to previous arrangement were bought in at the price of £600 by the plaintiff, for the benefit, as it was alleged, of Charles CinqMars. Immediately after this sale, Charles N. CinqMars proceeded to Montreal with one of the partners of the firm of Brown, Swan & Co., and there procedur

from that firm further supplies of goods in the name of Cinq-Mars & Co., the plaintiff, *though a minor*, only 18 or 19 years of age, being the nominal head of that firm. Goods were also subsequently procured from New York by Charles N. CinqMars, and brought up to Belleville to be disposed of with the other goods there.

The business carried on at Montreal by P. J. M. Cinq-Mars was closed soon after that at Belleville, in which he was interested, and P. J. M. CinqMars was declared insolvent, and made an assignment of his effects for the benefit of his creditors. The new business in the name of Cinq-Mars & Co., at Belleville, was carried on by Charles Cinq-Mars as the chief manager; the plaintiff, though nominally the head of the firm, acting under him, and obeying his orders. C. N. CinqMars was married, and with his wife and two children, and his mother-in-law, and sometimes one or two servants continued to live in the rooms previously occupied over the shop, in which he had the same furniture, and boarded some of the men. He took money when he required it, and goods, without rendering any account of what he took, and dealt with the goods as his own without restraint, the plaintiff living with him over the shop. P. J. M. CinqMars being unable to commence business at Montreal in his own name, a business was opened, under the law of Lower Canada, in the name of his wife, which was conducted by him. Being dissatisfied with the closing of the business at Belleville, and hearing from thence that the business was not getting on prosperously, he proceeded from Montreal to Belleville, taking with him a power of attorney to purchase the goods at that place on behalf of his wife, to be taken to Montreal, though never paid for, and to be added to the wife's stock of goods there. After his arrival at Belleville an assignment of the goods was actually executed; but finding that if assigned to his wife the goods would become liable to be seized for his debts in Upper Canada, that assignment was abandoned, and P. J. M. CinqMars and his brother C. M. CinqMars left Belleville for Montreal. Immediately after their leaving, the plaintiff and others in his employ commenced packing up the goods in cases, and they were all



sent to the steamboat wharf, addressed to Mrs. P. J. M. CinqMars, Montreal, during that night or the following morning. Mr. O'Hare, acting for Brown, Swan & Co., finding that the goods were about to be sent to Montreal, took out another execution for the balance remaining due to Brown, Swan & Co., and the defendant seized the goods at the steamboat wharf, as the goods of Charles N. CinqMars, and sold them under the execution. Charles N. CinqMars was examined as a witness on behalf of the plaintiff, and then endeavoured to shew that the purchase by the plaintiff at the first sale was entirely for his own account, and that the advance of further goods was wholly for his benefit and on his credit, and that he had not himself any interest in the goods so bought and advanced from Brown, Swan & Co.; and several circumstances were stated to shew that the plaintiff was in fact the party entitled to control the disposal of the goods, and was so considered by Brown, Swan & Co.

The jury found for the plaintiff, £743 13s. damages.

*O'Hare* obtained a rule *nisi* for a new trial, to which *Wallbridge*, Q. C., shewed cause.

ROBINSON, C. J.—It was urged as an argument in opposing this rule, that when a sale, which has been impeached on the ground of fraud, has been upheld as honest and *bona fide* by the verdicts of two juries, the court will not disturb it, and grant a second new trial upon the merits, as that would in effect be putting a man whose character as well as his property is at stake three times upon his trial for the same alleged fraud. Two acquittals, it was said, ought to be conclusive as regards the merits. But that is not putting this case correctly: the case was not fully tried upon the merits till this last occasion, for the ground on which the court granted the new trial was that the defendant had by an accident been deprived of his witnesses. They left Montreal for Belleville in time to be present at the trial, but were detained by an accident, such as will sometimes happen in a long passage by water, and did not reach Belleville till the day after the cause was heard.

Enough did appear in the evidence that was given, and in

the affidavits filed, to raise a strong doubt whether the plaintiff's claim had any foundation in justice; and as the sum claimed was large, the plaintiff's attorney, when he insisted on the case coming on in its order, was warned by the learned judge, that if it should appear after the trial that the defendant had failed in getting his witnesses by any accident, the court would probably, from the nature of the case, feel it proper to grant a new trial.

Upon this second trial the facts of the case have been probably as fully disclosed as they can be. The question of fact to be determined was whether a certain large quantity of goods, which had certainly been at one time the property of Charles CinqMars and Peter CinqMars, elder brothers of the plaintiff, had become the property of the plaintiff, and were his goods at the time that the sheriff, the defendant in this cause, seized them under an execution at the suit of Brown and Swan, as being still the goods of Charles and Peter CinqMars, the defendants in the *fi. fa.*

I think no one who has read the very clear statement of the facts, as they appeared upon the evidence to the learned judge who tried the case on the last occasion, can have much doubt (I must confess I have none), that D'Este CinqMars, the plaintiff in this cause, did never truly and *bona fide* purchase those goods on his own account. I have read the whole evidence several times as it stands in the judge's notes, and it has impressed me with a strong conviction that the plaintiff was a mere man of straw, set up as a purchaser at the sheriff's sale, as a pretended buyer to answer a particular purpose. I believe that the plaintiff, a mere lad under age, without any visible means of paying for such a purchase, had no more interest in the goods after the sheriff's sale than before, and that if he reaps the fruit of his verdict he will be recovering a sum of £743, as the value of goods for which he had paid nothing, nor ever was expected to pay anything—goods which did never honestly belong to him—and that he would be receiving his damages out of the pockets of Brown and Swan, who have indemnified the sheriff, and who having furnished these goods, or a part of them, originally to Charles and Peter CinqMars, have not

yet been paid the price of them by them or by any of them. But this is looking at the case in one aspect only : it is necessary to look at it in another.

How has it happened that the plaintiff has been able to make out such an appearance of his having been the purchaser of these goods, so as to satisfy the jury that he really was the owner ? By the strange conduct of Mr. Brown himself, one of the plaintiffs in the execution, who set the sheriff in motion, procured him to do the act which has given rise to this suit, and who has indemnified him for doing it, so that in fact he, or rather he and his co-partner, are really the defendants in this case rather than the sheriff. It may be, and that was hinted in the argument, that the sheriff is not adequately indemnified, owing to a change which has taken place in the circumstances of Brown and Swan ; but that may often happen, and it will not in any case make it proper to look upon the action against the sheriff which has followed, otherwise than we should do if the execution plaintiffs were the real defendants, for it is on their behalf, and in the assertion of their rights, that the sheriff had been acting. The sheriff, in such cases, has several courses open to him. He may make inquiry into the facts when a claimant of the goods appears, and act upon his own judgment without asking for an indemnity, in which case it behooves him to be scrupulously careful ; or after he has found out all he can of the facts, he may still ask to be indemnified if any doubt remains, and he will do wisely in procuring, if he can, that additional security. Or when indemnity is offered to him he may, if he chooses to do so, lean upon that alone and waive all attempt to inform himself of the real facts, in which case he certainly ought to be scrupulously careful as to the sufficiency of the bond he takes ; and when he takes that course he stands certainly in no more favourable position before the court than he would have done if he had acted upon his own responsibility. Now consider how the case stands here. Brown and Swan gave a large credit to Charles and Peter CinqMars when they commenced business as merchants at Belleville ; and finding that they have been unfortunate and are failing, Brown

comes up from Montreal to Belleville, and takes a confession of judgment from them for his debt, which was large, and no doubt a perfectly honest debt. This confession it is very probable, they would not give him but upon their own terms as regarded the use he was to make of it. He enters judgment and takes out execution at once, which it is not pretended was any violation of his understanding with them. Whether he or they, or all of them, were afraid of other creditors pressing, we can only conjecture, but we find the execution immediately acted upon. The goods are sold; that is, all which had been saved from the fire that had lately destroyed their shop; and though a sheriff's sale of such goods generally is attended with a great sacrifice, and he had probably nothing else to look to, we do not find him buying in the goods himself, but he puts forward as the ostensible purchaser this plaintiff, the brother of his debtors, a youth of eighteen or nineteen years of age, and apparently without means of buying.

And to make the transaction look as much as possible like a real sale to him, Brown gives credit in account with the execution debtors for the amount bid by the plaintiff, as if he had actually received that amount upon the *fi. fa.* in reduction of his debt, which would have been the case if the goods had been sold upon no private understanding, for then they would have actually realized to Brown & Swan the amount bid.

The effect of thus setting up the plaintiff as the purchaser at sheriff's sale, and acknowledging that the sum which they brought had been paid by him, was to keep other creditors from seizing the goods as the property of Charles and Peter CinqMars; yet after that, Brown claims a right to have these same goods sold under his own execution as being still the goods of Charles and Peter CinqMars. If to serve any end of their own at one time, or, which seems more likely, to serve the ends of Charles and Peter CinqMars, who still owed them a large sum, and when they demanded the confession could exact their terms, they chose to concur with them in setting up the plaintiff as the owner, must they not be bound by that, unless they can shew that the goods have in some way become again the property of his debtors?



The case is one of that kind, that if the jury had treated the plaintiff's pretence of being damnified by the sale of the goods as absurd, which I believe in truth it is, and looked upon him as a mere agent of Brown's, put in to keep other people off, and to preserve the goods still for Charles and Peter CinqMars, to be sold for their benefit and Brown's, and if the jury, under that conviction, had found a verdict against the plaintiff, or had given him a shilling damages, I think we might not have felt it incumbent upon us to interpose for his relief. But can we, without going against well-established principles, step in to save Brown & Swan from the very probable consequence of their own crooked policy? Whether the plaintiff was really the agent of Charles and Peter, upon the understanding that was come to among them, or of Charles alone, or of Brown & Swan, is not very clear: but if trusted by either of them, and held out to the world as having acquired an interest for himself alone, this is not the court in which he can be declared to be only a trustee, and especially at the instance of those who concurred in holding him up in a false character. Whether the parties who desire this would be better off in a Court of Equity, we need not inquire.

Brown may have done what he did solely because he could not get the confession of judgment without pledging himself to some arrangement of the kind, or he may have had confidence in Charles CinqMars, who carried on the business at Belleville, and been willing to trust to his conduct and exertions for working out the debt he owed him, provided other creditors could be kept off.

Whatever motive he had, the verdict which has been given is the natural consequence of his own arrangement, and we cannot set aside this verdict in order to allow Brown & Swan to have the proceeds of a second sheriff's sale of the same goods after they had credited the execution debtors with the proceeds of the first sale as received from this plaintiff, who bought them from the sheriff.

No attempt was made to shew that after the first sale Charles or Peter CinqMars bought them a second time, which would of course, have subjected them to be seized anew. Something was indeed proved on this trial, a son

the former, respecting an alleged transfer of the goods by the plaintiff to the wife of Peter CinqMars.

Of course such an assignment, if actually completed, would have made the goods the property of the husband, and as such liable to the execution; but the evidence only shewed that the plaintiff had thought of making such a transfer, and had taken some steps towards it, but being advised of what would be the legal effect, he gave up the intention, and never perfected the transfer.

On the whole case my opinion is, that we cannot properly set aside this verdict.

MCLEAN, J.—On the former occasion the facts were not distinctly brought out; and scarcely any defence was made; and the amount of the verdict being large, the court granted a new trial, in order that all the circumstances might be elicited on the second trial. That has been done, and it appears that though the plaintiff was known to be a minor, the goods were placed by Brown & Swan in his hands as the owner, and that he was debited with the price of them.

It is true it was not intended that he should be the owner, except nominally, but the course of dealing with the goods made them in fact the goods of the plaintiff; and though he may have consented to hold them subject to a secret trust for the benefit of his brother Charles, no one can complain of a violation of that trust but the party immediately interested. The breach of confidence towards Brown & Swan, if he consented to *hold* the goods for Charles CinqMars, cannot affect his right to *hold* the goods, for if he could hold and protect them against the claims and executions of other creditors of Peter and Charles CinqMars, he could equally hold them against Messrs. Brown & Swan. It is no doubt a hard case that Messrs. Brown & Swan should be obliged to indemnify and pay to a party who has never paid, and most probably never will pay the value of their goods; but by placing them in the hands of the plaintiff in the first instance they ran the risk of losing them, and if they sustain a loss they must attribute it to their own imprudence in consenting to an arrangement of a questionable character, inasmuch as

others might be misled by it, though it was intended to cover goods which they had honestly a right to control.

If the verdict had been for the defendant, perhaps the court would not interfere and afford another opportunity to the plaintiff to recover the value of goods for which he has never paid anything, to the prejudice of the parties to whom they ought to belong, but it would be going too far to grant a second new trial, with a view to relieve parties from a dilemma into which their own want of prudence has led them. I think therefore the rule *nisi* for a new trial must be discharged.

BURNS, J., concurred.

Rule discharged (a).

### BURKE V. ELLIOTT ET AL.

*Promissory note—Notice of non-payment—Promise to pay—Waiver.*

A promise to pay made after action brought will avail the plaintiff as well as if made before.

A conditional promise by an indorser to pay in lands, or see that the plaintiff should lose nothing, is sufficient to waive any objection as to notice of non-payment.

This was an action upon a promissory note made by the defendants, the two Elliotts, payable to the defendant Heran, or order, for £100, at one month after date.

*Pleas*, by the defendant Heran—1st. That the note was not duly presented; and, 2nd. That he had not due notice of non-payment.

At the trial before *Burns J.*, at the last assizes held at Niagara, the case appeared as follows:—the two Elliotts, as makers of the note, had no defence against it. The plaintiff called both of the makers of the note, who proved that the defendant Heran had taken an assignment of their property to secure himself against liabilities for them, and this note was included therein. Afterwards another security by way of mortgage was given by the Elliotts in lieu of the first security, and this note was left out of the mortgage. One

(a) This case was decided in Michaelmas term, 1856. It was afterwards carried up to the Court of Appeal, but was dismissed on the hearing, on the ground that an appeal will not be entertained from a decision resting only upon the discretion of the court below, and not upon matter of law. The case was however argued upon the merits, and the court intimated that they fully concurred in the view which had been taken of it.

See *Bell v. Peel*, ante, page 594.

of the Elliotts stated that he was present at a conversation between the plaintiff and defendant after the note became due. The plaintiff offered to take a new note if the defendant Heran would indorse it, but this he refused to do, and said that he was not liable upon the present note, and explained that he had received the notice before the proper time for notifying the non-payment; but he offered to the plaintiff a share equal to his own in the securities which he held from the Elliotts, and added, "*I will see that you do not lose anything on it.*" The attorney for the plaintiff proved that after the note was placed in his hands he spoke to the defendant about it, and then the defendant claimed that he had no legal notice of the non-payment, having been notified on Saturday, before the note was due, instead of upon the Monday, but said that he had security for the amount of it, and that if the plaintiff would wait until the security was realised he would pay it. The defendant further stated to him that he had offered land to the plaintiff, and to allow this note, so far as the amount of it, in payment of the land, and would still do it; or that if the plaintiff would assent, he, the defendant, would allow Elliott to sell some of the securities he, the defendant Heran, held, and pay the amount of the note.

The learned judge left it to the jury to say whether they believed the statements, and directed them that if so they might draw the inference of a promise to pay, which would be sufficient to dispense with strict proof of dishonour, but to do so the jury must believe that defendant's offers were not conditional in any way. The jury were not told they should draw the inference that defendant had dispensed with proof of notice, but that the learned judge inclined to think the evidence sufficient to go to them to draw such an inference, if they felt satisfied the defendant Heran promised to pay.

*Lawder* obtained a rule to shew cause why there should not be a new trial, the verdict being contrary to law and evidence, and for misdirection.

*Eccles*, Q. C., shewed cause, and cited *Campbell v. Webster*, 2 C. B. 265.

*Connor*, Q. C., supported the rule, and cited *Standage v. Creighton*, 5 C. & P. 406; *Byles on Bills* 237, note *k*.



ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the verdict should be allowed to stand. It has been several times determined that it makes no difference that a promise to pay in such cases was made after action brought; but it will avail the plaintiff as well as if made before, because the action is not founded on the promise, which is only received as evidence of an acknowledgment of liability on the note: and the case cited by Mr. *Eccles* of *Campbell v. Webster* (2 C. B. 258) is in the plaintiff's favour upon the other point, namely, the promise being conditional, to pay in land, and to see that the plaintiff lost nothing, &c. This is not for the same reason, that the promise is relied upon only as an admission of liability.

We think the fact that defendant knew he had not had a strictly regular notice is of no consequence after his promise to pay, for he is estopped from taking the advantage after waiving it.

In this case the deviation from what was regular in the notice was very slight, and what is most material as regards the merits, the defendant had secured himself by assignment of property taken from the makers. After the evidence given on that point, we should hardly have granted a new trial, even if we saw that there was a misdirection, when there was no point reserved, for the verdict is clearly in accordance with justice.

Rule discharged (*a*).

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### MORAN V. JESSUP.

*Ejectment—Former recovery,*

Where a plaintiff in ejectment recovers land of which he has been for twenty years dispossessed, and is put into possession by the sheriff, the defendant is not precluded from trying the right again, and relying in an action brought by him upon his title acquired by the twenty years' possession.

This was an action of ejectment for the part of lot No. 5 in the first concession of Augusta, which was tried at Brockville, before Hagarty, J., and resulted in a verdict for defendant as to part of the land defended for, and for the plaintiff as to the residue.

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(*a*) See *Bank of Upper Canada v. Cooley*, 4 O. S. 17; *Bank of British North America v. Ross*, 1 U. C. R. 199; *Brownell v. Bonney*, 1 Q. B. 39.

*Galt*, for defendant, obtained a rule *nisi* for a new trial, to which *O'Reilly* shewed cause.

Upon the facts of the case which are not material to be reported, a new trial was refused ; but a question was raised as to the effect of a former recovery in ejectment by this defendant against the plaintiff for part of the land in question ; and upon this point ROBINSON, C. J., in delivering the judgment of the Court, said—

I do not think that the fact of this defendant having received possession from the sheriff of the land in dispute after twenty years had elapsed, during which he had been dispossessed, would prevent the defendant in the former action from becoming plaintiff in his turn, and trying the right over again, by relying upon what has been called his parliamentary title, acquired by twenty years possession. I refer on that point to the case cited in the argument of Doe dem. Ausman v. Minthorn (3 U. C. R. 423), and to Doe dem. Jukes v. Sumner (14 M. & W. 39). The distinction I take to be, that a man may rely upon a previous peaceable possession, though short of twenty years, as entitling him to recover against an apparent wrong-doer ; but he cannot stand upon his previous possession only, if he had voluntarily abandoned it before the defendant took possession. And though he did not voluntarily abandon possession but was compelled to quit by a recovery against him in ejectment and execution upon it, he cannot in such case stand upon his previous possession unless it had ripened into a title under the statute, in which case, I apprehend he might, as much as if his title was by deed ; and that is what the plaintiff contends is his position in this case.

Rule discharged.

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During this term the following gentlemen were called to the bar: PATRICK MACGREGOR, SHUBAEL PARK, GEORGE D'ARCY BOULTON, RICHARD THOMAS WILKINSON, ROBERT MAHON ALLEN, RUPERT MEARSE WELLS.

## MICHAELMAS TERM, 21 VICTORIA.

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*Present:*

THE HON. SIR JOHN BEVERLEY ROBINSON, BART., C. J.,  
 “ ARCHIBALD MCLEAN, J.,  
 “ ROBERT EASTON BURNS, J.

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## TODD V. WERRY ET AL.

*Sale of land for taxes—6 Geo. IV., ch. 7, 7 W. IV., ch. 19.*

**Ejectment.** In 1857 the clerk of the peace issued the proper warrant to the sheriff to sell the land in question for taxes, but the sale was delayed by the 1 Vic., ch. 20, passed in consequence of the rebellion, and was made in 1839, *under the same writ*. It was first put up on the 10th of April, when one M. offered to take 29 acres for the sum to be levied; but afterwards he refused to carry out the purchase, and the sheriff in July following put up the whole lot, 200 acres, which M. then purchased for the same sum, stating at the sale that he had already acquired a title to the land, which he wished to have confirmed, and requesting the by-standers not to bid against him. This title came by deed from the treasurer, who had purchased from a person assuming to be heir of the patentee, but was not in fact his heir, and M. had given back a mortgage to the treasurer to secure part of the purchase money.

**Held**, that the sale was properly made in 1839 under the same writ issued in 1837; but that the second sale of the whole lot was illegal, being unauthorized by the statutes, and improperly conducted.

*Semble*, that the treasurer's connexion with the land could not avoid the sale, he not having been in fact the purchaser.

**EJECTMENT** for lot No. 1 in the 5th concession of Darlington. Werry defended for the south half, and John and Duncan Smith for the north half.

At the trial at Cobourg, before *Hagarty, J.*, it appeared that patent issued for this land to Benjamin Fralick, on the 10th of August, 1801.

On the 18th of July, 1802, Benjamin Fralick conveyed the land in fee to Isaac Todd, by deed not registered.

The plaintiff was devisee of all the real estate of the said Isaac Todd situate in Upper Canada.

On the part of the defendants it was proved that this lot was returned to the treasurer in 1837 as having £3 5s. due upon it for arrears of taxes, and that the treasurer, the late

Honourable Zaccheus Burnham, made a return accordingly to the clerk of the peace.

The land was in fact eight years in arrears in 1837, and in that year the clerk of the peace made out the proper warrant upon the treasurer's return, which warrant was given to the sheriff on the 5th of August, 1837. It directed £3 5s. to be made as the arrears of taxes from the 1st of July, 1829, to the 1st of July, 1837. The land would have been sold in 1837, but on account of the rebellion it was not sold till 1839, in consequence of an act being passed by the Legislature, 1 Vic., ch. 29, which directed that a delay should take place in all such sales.

On the 9th of July, 1839, it was sold under the writ which had issued in 1837, and was then bid off by one McLarty, who stated publicly at the sale that he was the owner of the lot, by a title which he wished to have confirmed by purchasing at the sheriff's sale, and he requested the by-standers not to bid against him. The sheriff put up the whole lot, 200 acres, and asked who would take the least number of acres to pay the amount to be levied. No one offered to take less than the whole, and the 200 acres were knocked down to McLarty for the £3 5s. and fees, there being, it seemed, no opposing bid. There had been previously—that is, on the 10th of April of the same year (1839)—an attempt to levy the tax on this lot by sale, and on that occasion the same man, Alexander McLarty, offered to take 29 acres and pay the sum to be levied; but afterwards he refused to make good his bid, wishing probably to make use of the sale as a means of confirming his title to the 200 acres, which end would not have been answered if he had paid the money and taken a deed for the 29 acres only.

The sheriff, in consequence of his not paying, put up the lot at an adjourned sale on the 9th of July, in the manner mentioned.

The sheriff gave no certificate after the sale in April, because he had not been paid the money. McLarty obtained a deed from the sheriff of *the whole lot* on the 7th of August, 1847, which was registered on the 15th of August, 1855. This deed stated the land to have been sold for £3 13s. 6d.



The defendants derived their title by conveyance, as purchasers, through McLarty.

It was proved also upon the trial, that the patentee, Fralick, having died, Mr. Burnham, the late treasurer, in December, 1831, bought this lot from one John Fralick, supposing him to be heir; that McLarty had gone into actual possession of the lot before he bought at the sheriff's sale, and had taken a release from Mr. Burnham on the 18th of February, 1839, of all his interest in the land, while he was so in possession.

It was afterwards discovered, as was stated on the argument of this rule, that John Fralick, who assumed to sell to Mr. Burnham as heir of the patentee, was not in fact his heir; and that McLarty stated to a person before the sheriff's sale that he intended to buy the lot at the sale, in order to remedy the defect in his title from Burnham.

On the 18th of February, 1839, the same day that McLarty's deed from Burnham was executed, McLarty gave back a mortgage to Burnham for £250, which mortgage Buchanan assigned on the 24th of April, 1847, to one Wilkinson, and it came by assignment to one Maitland, and the two defendants Smith, to whom McLarty afterwards assigned his equity of redemption, and they sold the south half to the defendant Werry.

It was proved by a witness that the land at the time of the trial was worth £15 per acre. When it was sold in 1839 there was nothing on it which could have been distrained for the taxes.

The plaintiff's counsel objected to the defendants' title, that as Mr. Burnham, the then treasurer, had claimed to be the owner of the lot, and was in fact at the time of the sale seised of the legal estate under the mortgage, and so interested in upholding his title under that mortgage, the case came within the statute of 7 Wm. IV., ch. 19, sec. 3, which prohibits treasurers of districts from buying at sales of lands sold for taxes. Also, that the second sale was illegal, because the sale before made of 29 acres to McLarty ought to have been insisted upon, and carried out by the sheriff, instead of the land being put up again at an adjourned sale, not *bona fide* for

the public purpose of making the taxes, but in order to afford an opportunity to Mr. McLarty to buy in the whole 200 acres, either to serve the purpose of Mr. Burnham or of McLarty.

Also, that the sheriff's certificate of the sale was not registered, as the statutes requires, by the county registrar; and that the sale was void, because it was made by the sheriff under a writ not then current.

The defendants declined consenting that the plaintiff might have leave to move to enter a verdict in his favour upon the objections. The learned judge was inclined to think that there might be found to be much weight in the objections raised against the plaintiff's title, but recommended the jury to give their verdict to the defendants upon this title made out through the sheriff's sale, leaving it to the plaintiff to move upon the legal exceptions, and the jury accordingly found for the defendants. There was no room for a question under the Statute of Limitations.

*Crooks* obtained a rule *nisi* for a new trial on the law and evidence, renewing the objections taken at the trial. He cited *Eearly v. Doe*, 16 Howard 610; *Hoyt v. Dillon*, 19 Barb. 644; *Trent v. Hunt*, 22 L. J. (Ex.) 319, S. C. 22 Eng. Rep. 546; *Stead's Executors v. Course*, 4 Cranch 401; *Tiernan v. Wilson*, 6 Johns, Ch. Rep. 411; *Lane v. James*, 25 Verm, 481.

*Galt* shewed cause.

The statutes referred to are cited in the judgments.

ROBINSON, C. J.—I think the effect of the statute 1 Vic., ch. 20, was simply to postpone the sale till after the end of the year 1838, without necessity for any other proceeding after that year had expired than a proper notice by advertisement of the time of sale. I do not think that when a writ to sell had issued, the statute made it necessary that another writ should be taken out before there could be an advertisement of a sale in 1839, because then the same proceedings would not be taken after the year as would otherwise have been taken by law, which is what the statute evidently means.

The 6 Geo. IV., ch. 7, sec. 8, required that the writ should be made returnable at the third court of quarter sessions after it issued, and this writ, which had issued in August, 1837, therefore had undoubtedly become returnable long before the end of 1838; but the statute had the effect, I think of enlarging the return, and of allowing notice of sale to be given under it in 1839, without incurring the expense of a new writ; and the second clause of the statute 7 Wm. IV., ch. 19, tends to shew that this is a reasonable construction to place upon the 1 Vic., ch. 20. I do not think, therefore, there is any thing in the first objection, though I am not sure that both my brothers take the same view of that question.

As to the second objection, that it was in effect the treasurer, Mr. Burnham, who purchased, and that such purchase by him was contrary to the statute, 7 Wm. IV., ch. 19, sec. 3, and was therefore void, by the express words of that section; the purchase would be void, undoubtedly, if it be true that the treasurer, Mr. Burnham, was either directly or indirectly the purchaser at the sale, but we cannot hold that he was. He had before parted with his interest to McLarty, having conveyed to him by deed on the 18th of February, 1839, and both at the sale in April of that year, and at that in July following, it was McLarty who bid of the land, and not Mr. Burnham, the treasurer. The latter may have been desirous to have McLarty's title confirmed through a sale for taxes, if he then knew that the title which he had himself given to McLarty was good for nothing, in consequence of the John Fralick who conveyed to him, Burnham, not being the heir of the patentee; but neither that wish of his, nor his having, by any concert with the sheriff or otherwise contrived that the sale should be so managed as to enable McLarty to become the purchaser of the whole lot, would authorise us to hold that it was Burnham who either directly or indirectly purchased the lands at the sheriff's sale, for McLarty was himself there in person, and openly bid for the land, and publicly avowed his wish to purchase, and the land was knocked down to him, and afterwards conveyed to him by the sheriff. That such sale to McLarty might be

useful to Burnham, by saving him from an action on his covenants in the deed which he had before given to McLarty, could not bring the case within the enactment referred to.

Then the other point in the case is, that the sale made in July, 1839, upon which the sheriff's deed was founded, was void, because it was conducted in opposition to the statute 7 Wm. IV., ch. 19, and in fraud, as it is contended, of the proprietor.

That objection is entitled in my opinion to prevail. In April, 1839, the sheriff seems to have put up the land as the statute directed, 7 Wm. IV., ch. 19, sec. 2, and McLarty became the highest bidder within that clause, for he offered to take twenty-nine acres and pay the £3 13s. 6d., which the writ required should be levied, and no one, it appeared, offered to take less land and pay the money. He was therefore the highest bidder.

Then why was that sale not carried into effect? Why was the whole lot afterwards exposed and sold to the same bidder for the same sum of £3 13s. 6d.? The plaintiff contends that it was manifestly because there was a determination to facilitate his wishes, or promote his interests, or Mr. Burnham's, that the first sale, which was made in accordance with the statute, was treated as a nullity, and a new sale made in July, when the whole 200 acres were unnecessarily put up for sale, instead of McLarty being required to take the 29 acres and pay the money, thus unnecessarily and improperly throwing upon the proprietor the sacrifice of having his whole lot sold for a trifling sum of money, which might as well have been made by the sale of a smaller portion.

If the case turned entirely upon the motive with which the thing was done, that would present a question for the jury, which they should have been asked to determine, and which we cannot pronounce upon; but it does not turn upon that.

We must consider how could the sale of the whole 200 acres be justified in such a case, after the passing of the act 7 Wm. IV., ch. 19. That act provides that if no bidder shall be found who will take as many acres as 2s. 6d. per acre as will pay the amount to be levied, then the sheriff



shall without any new writ, expose so much of the land for sale as may be necessary for making the amount, and such sale is to take place at the next Court of Quarter Sessions after the expiration of the six months' notice required by law, which I assume means six months' notice after the ineffectual attempt to sell.

The land here was sold a second time three months after it had been publicly bid off in the manner which the law, as it then stood, directed. It was not even then sold by exposing so much for sale as might be necessary for making the amount, but as all sold to the person who had bid it off at a former sale, which had been properly conducted: that is, 200 acres of valuable land were nominally, not really, sold for £3 13s. 6d., in order to allow a man's title, as it is stated to be confirmed under a supposed sheriff's sale (for it could be regarded as nothing more) to the prejudice of the real proprietor.

It does not appear on the evidence that the bidder at the first sale refused to make good his bid, or that the sheriff insisted on it. If that were the case, however, it would only have warranted the sheriff in adjourning the sale under the 16th clause of 6 Geo. IV., ch. 7, to a future day, when he ought to have put it up again for sale in the manner directed by the second clause of 7 Wm. IV., ch. 19.

In my opinion the sale was conducted in a manner not authorised by the statute 6 Geo. IV., ch. 7, or by the 7 Wm. IV., ch. 19, and was therefore void, because it was not a mere omission of any such matter as is spoken of in the 22nd clause of 6 Geo. IV., ch. 7, but a substantial departure from the law in a point most essential to the interests of the owner of the land.

I should regret that in any case of this kind a person who has bought under a title derived from the sheriff's vendee should be deprived of the land, and made to lose perhaps the cost of valuable improvements that he may have made; but we may suppose that he has proper covenants from the sheriff's vendee, who certainly in this case would not be entitled to much consideration, if he was really attempting, under cover of the sheriff's sale, to conform a title which he

had ground for believing had come through a person having no right to convey.

It was besides proved in this case, that these defendants, in the first place, bought the land under the sale directed by the Court of Chancery at the instance of Burnham as mortgagee, and did not take their title in reliance on the affirming of McLarty's title under the sheriff's deed.

That however is only a consideration which tends to shew that any hardship upon the defendant, in consequence of the view which in our opinion must be taken of the title set up under the sheriff's deed, does not press so hardly in this case as it might in many others. It is not a consideration which we could suffer to affect our decision.

For the reasons which I have given I am of opinion that the rule for a new trial, without costs, must be made absolute.

MCLEAN, J.—Probates of the wills of Isaac Todd and William Thornton Todd were put in, and the plaintiff claimed under these. It was shewn that the lot was unoccupied, and in a state of nature till 1839.

The defendants claimed under a deed made by one John Fralick to the Honourable Zaccheus Burnham, bearing date the 23rd of December, 1821, for the consideration of £12 10s. and under a deed from the sheriff of the Newcastle district, on a sale for taxes, bearing date the 17th of August, 1847. If these deeds are valid, the title of defendants derived under them cannot be disturbed, but if otherwise, the plaintiff must be entitled to succeed, as there seems to be scarcely a doubt as to the correctness of the deed from the patentee to Isaac Todd.

Then with respect to the deed from John Fralick to Burnham, there is no evidence to shew what interest the grantor could possibly have had in the premises, If in truth he was the heir at law of Benjamin Fralick, the patentee, that fact should have been shewn; but even if it had been shewn, the prior deed to Isaac Todd, produced by the plaintiff, and unimpeached, must be entitled to prevail. It is not registered, but being the first transfer from the patent it was not essential to the validity of the title that it should be registered.

Had it been recorded, the probability is that all difficulty respecting the lot would have been avoided, and the defendants, who appear to be innocent purchasers for value, would not now be exposed to the loss of what they had good reason to consider their unquestionable property. If the title derived through Mr. Burnham is defective, as it certainly appears to be, then the deed executed by the sheriff in 1847, on a sale for taxes made in 1839, becomes the only support on which the titles of defendants can depend. It is shewn that in 1839 there was not any distress upon the lot, from which any taxes due upon the lot could have been levied; so that, if taxes were actually due, the lot or a part of it would be liable to be sold for the amount. Under 6 Geo. IV., ch. 7, the whole lot might be put up for the amount of tax, whatever it might be; and if no one would take less than the whole might be sold, and unless redeemed within a year might be conveyed by the sheriff. In 1837, the legislature found it necessary, according to the preamble of the act of 7 Wm. IV., ch. 19, "to afford to the proprietors of land sold to pay assessments in arrear, as much protection as may be consistent with the carrying fully into effect the laws in that behalf;" and the system formerly in use of selling in the several townships was changed, and sales were required to be held in the towns in which the Quarter Sessions were usually held, such sales to take place at or near the court-house on the second day of the sitting of the courts. By the second section lands in arrears for taxes were required to be put up for sale at 2s. 6d. per acre, and only a sufficient quantity could be sold at that price to satisfy the amount to be made, but if a larger price were offered a smaller portion of land would be sold. If no bidder could be found, who would take land at 2s. 6d. per acre and pay the taxes, then the sheriff might, at the next court of Quarter Sessions which should occur after the expiration of six months' notice required by law, without any new writ, expose so much of the land for sale as might be necessary for making the amount directed to be levied, together with lawful interest thereon from the time the same became due. By the testimony of the sheriff it appears that in April, 1839, no doubt at the court of Quarter Sessions

then held in the district of Newcastle, the lot in question, or so much of it as was necessary at 2s. 6d. an acre, was put up for sale for taxes, and one Alexander McLarty then became the purchaser of 29 acres at that price. The same person had on the 18th of February preceding become the purchaser of the whole lot, and had taken a quit claim for it from the Honourable Zaccheus Burnham for the consideration of £250; and that deed, and the mortgage given at the same time to secure the purchase money, are witnessed by the sheriff, who in April sold the 29 acres for taxes to the purchaser. That sale of 29 acres was not carried out. Mr. McLarty, though he had previously purchased and agreed to pay a larger price to Burnham, not paying over the amount of tax. In July following the whole lot was exposed to sale, as if there had been no bidder at the previous sale willing to purchase at 2s. 6d. an acre, and then the same person who had bid off 29 acres in April as sufficient to cover the taxes, was allowed, upon his representation that *he had a title and wished to perfect it*, to become the purchaser of the whole lot. The deed from the sheriff, to which McLarty was entitled at the expiration of a year from the sale, was not however made out till the 7th of August, 1847. It is manifest from the statement of Mr. McLarty at *the time of the sale*, and from all the proceedings, that the object of the second sale was to enable McLarty to purchase the whole lot, and so to perfect his title; and that it in fact was not necessary for the purpose of realizing the amount of taxes due, which could have been enforced under the first sale as well as the last. The sale thus made for the particular accommodation of McLarty, and not for any public end, if it could be upheld, would undoubtedly cause a very considerable loss to the plaintiff as the owner of the land, and in fact it must be considered as a fraud upon him. The statute declares that it is only *in case no bidder shall be found who will accept the quantity of land exposed to sale at its valuation of 2s. 6d. an acre*, that the sheriff shall be at liberty to sell any greater quantity at a subsequent sale. But at the sale in April a person was found, who for the 29 acres offered at that time for sale at its valuation, was willing to pay the amount of tax then due;



and that being the case, and an actual purchase being made the sheriff could not subsequently sell the *whole* lot as if no such bidder had been found. He would have been justified in putting up a portion of the lot at 2s. 6d. an acre, in case the money remained unpaid on the first sale, and had he done so there can be no doubt that McLarty would have paid up the amount of tax to prevent another person from becoming a purchaser of a part of the lot which he had previously purchased from Mr. Burnham for the sum of £250. The second sale was manifestly intended to make good Mr. McLarty's title from Mr. Burnham, but being made after the previous sale of a part to the same individual, and without any necessity for the purpose of levying the amount of taxes, it must be considered as illegal and void, and the defendants' title, as dependent upon it, must fall with it. The jury have rendered a verdict for the defendants, and the learned judge who tried the cause seems to have thought it right that such a verdict should be rendered on the evidence. I confess I have come to an opposite conclusion, and think the testimony would clearly have justified a verdict for the plaintiff. On these grounds, therefore, I think a new trial should be granted.

BURNS, J.—If it were necessary to consider this case upon the point made, whether the purchase at the sheriff's sale was not in truth a purchase in fact on behalf of and for the benefit of Mr. Burnham, the treasurer of the district, and so void under the third section of 7 Wm. IV., ch. 19, there would be much room to question the transaction; and if the jury found that in truth the purchase was made by Mr. Burnham's vendee, for and on his account, and for him, then the conveyance would *ipso facto* be void; but it is not necessary to do more at present than say the sale for the taxes cannot be supported against the provisions of the second section of 7 Wm. IV., ch. 19. It appears the sheriff put up a portion of the lot on the 10th of April, 1839, according to law, and twenty-nine acres were bought at 2s. 6d. per acre, in order to pay the taxes. The purchaser refused to pay the amount, and at an adjourned sale on the 9th of July, 1839, the sheriff

again put up the property. On this occasion the same person attended, and represented that he wished to perfect his title to the whole lot, and desired it to be put up in that way. The sheriff did put up the whole lot, and it was knocked down to the same person for the taxes. This sale of the whole lot is directly contrary to the statute. The second sale did not take place by reason that there were no bidders at the first sale, nor was it at the next Court of Quarter Sessions after the expiration of six months' notice; so that in every way what was done on the 9th of July, 1839, was a nullity.

The 22nd section of 6 Geo. IV., ch. 7, does not provide for curing such a defect as appears in this case. In fact it was not a defective sale, but it was an illegal sale of the land, and no one can acquire title under that illegal act of the sheriff.

Rule absolute.

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### BROSS V. HUBER.

*Trespass against a magistrate—Proof of quashing conviction—Evidence of plaintiff's guilt of the charge—Effect of—Provisions of statute overlooked at the trial—16 Vic., ch. 180. sec. 12—Notice of action—Name and residence of attorney not indorsed.*

Trespass against a magistrate for seizing and selling plaintiff's goods. To prove the quashing of the conviction a rule of court was put in, in which the offence, the name of the complaint, and of the magistrate, were mentioned.

*Held* sufficient, without further identifying the conviction mentioned in the rule with that on which the warrant issued, for the court would not presume another conviction similar in all these respects.

At the trial evidence was given to shew that the plaintiff had been guilty of the offence charged, but such evidence was offered and received only in mitigation of damages; the provisions of the 16 Vic., ch. 180, sec. 12, which in such a case limits the damages to 2d. and deprives the plaintiff of costs, were overlooked, and the plaintiff obtained a verdict for full damages.

*Held*, that there must be a new trial without costs.

*Held*, also that the provision is not confined to actions where the justices had jurisdiction.

The name and place of residence of the plaintiff's attorney were not *indorsed* on the notice of action, as directed by the statute, but were added inside at the foot of the notice.

*Held*, sufficient; and that at all events, such objection not having been taken at the trial could not be made in banc.

This was an action of trespass, brought against a magistrate, for seizing and driving away two cows, one heifer, and

eight sheep of the plaintiff, and for selling and disposing of the same.

*Plea*, not guilty, by statute.

At the trial, at Berlin, before *Burns*, J., the facts appeared to be as follows:—notice of action was served on the 13th of August, 1857, and no objection was made to it. The action was commenced on the 10th of October. A rule of this court was put in, which was dated 14th of September, 1857, entitled in the matter of the complaint of D. S. Shoemaker, against Anthony Bross, for obstructing a road in the township of Waterloo, whereby it was ordered that upon reading the writ of *certiorari* in the matter, and the return thereto, the conviction of the said Anthony Bross mentioned in the said writ and return should be quashed. (a)

The plaintiff called the constable, who had executed a warrant of distress on the plaintiff's goods. He proved the defendant's signature to the warrant, and that the defendant gave it himself to the witness, and under it he seized on the 28th of July, 1857, two cows, one heifer, and eight sheep, and sold them, after advertising them, for the sum of £13 11s. 3d. The fine directed to be levied was £6 15s., and £1 5s. 9d. for costs, The constable made his return to the defendant, and after deducting his fees from the £13 11s. 3d., he paid over the balance to the defendant. The warrant recited the conviction. The property was bought in by a brother-in-law of the plaintiff. A witness proved that in his opinion the whole value of the property was about £25. The bill of costs, which the plaintiff paid, for expenses for quashing the conviction, was £13 17s. 7d., and besides this the plaintiff had several journeys to consult counsel, &c., during the progress of the proceedings.

The defendant's counsel objected to the sufficiency of the evidence to charge the defendant in an action of trespass because there was no proof that the conviction mentioned in the rule of court as being quashed, if the proper way to prove the quashing of a conviction was by production merely of the rule of court, was identical with the conviction mentioned in the warrant to seize the plaintiff's goods. He

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(a) See *Regina v. Huber ante*, page 589.

contended that some record should be produced or shewn to prove the quashing of the conviction, and the identity with the one mentioned in the warrant.

The learned judge reserved leave to the defendant to move the court to enter a nonsuit if the evidence were insufficient.

The defendant then called witnesses to shew that complaints had been made to the Municipal Council on the subject of the plaintiff having encroached upon a highway adjoining his property, and that the Clerk of the Council (Mr. Shoemaker) by sanction of the Council, laid the complaint before the defendant, and he having heard the matter convicted the plaintiff and fined him. Evidence was also given to shew that the plaintiff in truth did encroach by his fence upon the road : and that he had been notified to remove his fence, but refused. This evidence was not offered by the defendant's counsel to bar the plaintiff's action, but to **shew** that the defendant did not act without thinking he had a right to do so, and to mitigate the damages.

The jury found a verdict for the plaintiff for £40 damages.

*M. C. Cameron* obtained a rule to shew cause why a nonsuit should not be entered pursuant to the leave reserved, or why there should not be a new trial, on the ground of misdirection, in this, that the learned judge directed the jury that the guilt of the plaintiff in obstructing the road was no bar to the plaintiff's right of action, and was only to be considered with respect to the amount of damages the jury might award for illegally convicting when he had no jurisdiction. He objected also to the notice of action, that it was not properly indorsed with the name of the plaintiff's attorney on the back of the notice, though in the inside and at the foot of the notice it was properly signed. He admitted that no objection was taken at the trial to the notice, and that the provisions of the statute 16 Vic., ch. 180, had escaped his attention, and the same were not brought to the notice of the judge ; and argued that if these provisions had been acted on the verdict must have been different. He cited *Haylock v. Sparke*, 1 E. & B. 471.

*Freeman*, Q. C., shewed cause.



ROBINSON, C. J.—The questions to be considered are—*First*. Was it sufficient to produce the rule of court quashing the conviction, without giving evidence to identify the conviction as that on which the warrant issued.

All that was produced was a rule of court under the signature of the clerk, entitled in the matter of the complaint of D. S. Shoemaker against Anthony Bross, for obstructing a road in the township of Waterloo.

*Secondly*, With regard to the notice of action: no objection to it was taken at the trial, but the objection taken on moving the rule was that the name and place of residence of the plaintiff's attorney was not *indorsed*; that is, written on the back of the notice. It was added to the signature of the plaintiff at the foot of the notice itself, thus, "Yours, &c., Anthony Bross, of the township of Waterloo, in the county of Waterloo, by his attorney, *Samuel B. Freeman*, of King Street, in the city of Hamilton, in the county of Wentworth."

*Thirdly*. It seems the learned judge did admit evidence respecting the offence charged in the conviction, but only with a view to its bearing upon the question of damages, as shewing that there was no malicious conduct on the part of any one against the plaintiff, for that he had in fact obstructed the highway; and the municipality had directed steps to be taken for opening it. The particular provisions of the statute 16 Vic., ch. 180, it seems escaped attention at the trial, and the jury were not charged with a view to them.

The defendant not having objected to the form of the notice of action at the trial, cannot, I think, make it a ground of motion against the verdict now; and besides, the notice was not in my opinion a defective compliance with the act. The placing the name and place of residence of the attorney at the foot of the notice is not literally indorsing it, and so the direction of the statute is not literally complied with, but it is in substance.

I do not see that the rule of court should have been otherwise proved upon the trial than it was; and it would be assumed, so long as nothing appeared to the contrary, that the conviction set aside was that in question, as the court would not presume that there was another conviction upon

the complaint of Shoemaker against the same defendant, and before the same justice, and for the same offence.

I do not see any ground of nonsuit, but I think there was a failure to carry into effect the provisions of the statute 16 Vic., ch. 180, sec. 12.

If the evidence shewed that the defendant had fenced in a part of the highway, then he was guilty of the offence charged upon him—that is obstruction of the highway—though not that kind of obstruction which is punishable summarily before a magistrate; and the 12th clause of the statute, where that is proved, as the act says, limits the plaintiff's damages to 2d., and deprives him of costs.

The meaning of the provision, I take it, is that the jury are to find whether the plaintiff had or had not committed the offence charged upon him, and if they find he had, then the verdict could only be entered for 2d.

That clause, I think, is not confined to actions where the justice had jurisdiction. It extends to all actions following a conviction. We are bound, I think, to see that the defendant has the benefit of the act passed for the protection of magistrates, whose duties are onerous and often difficult, and who, with no intention to oppress, are apt to fall into errors, against the consequence of which the legislature intend they shall be protected, where they acted with no bad motive or feeling, and where the plaintiff had really committed such an offence as he had been accused of.

We make absolute the rule for a new trial, without costs, in order that the jury may be told at the next trial, that if they are satisfied the plaintiff did obstruct the highway unlawfully, and was liable for it to as heavy a fine as the defendant had imposed upon him, they were then by statute disabled from giving more than 2d. damages.

BURNS, J.—I think there should be a new trial in this case. There has been a miscarriage of the case on the part of the defence, and probably to a certain extent on the part of the plaintiff. The provisions of the 12th section of 16 Vic., ch. 180, were overlooked by all parties at the trial. When the defendant's counsel offered to prove that in truth the

plaintiff had encroached upon the highway, the plaintiff's counsel objected to the reception of the evidence, on the ground that the defendant could not shew that the plaintiff was guilty of stopping the highway, for that would shew him to be subject to be indicted for a nuisance. I received the evidence generally, merely for the purpose of governing the jury in judging how far it could be said the defendant had acted as a justice of the peace, without at all events thinking he was right. The defendant did not propose the evidence with a view of shewing that the plaintiff was guilty of a nuisance, and might have been fined upon an indictment for obstructing the highway, which he might have done under the provisions of the 12th section. The provisions of the 12th section apply equally to the action which may be brought under the first section, where it is necessary to allege that the act was done maliciously and without reasonable and probable cause, as under the second section, where the magistrate has acted without having jurisdiction, and it is first necessary to quash the conviction. If it be open to the defendant to shew that the plaintiff might in truth have been fined for obstructing the highway upon an indictment and trial, then it is equally open to the plaintiff to prove and establish that there was no highway. In the present case the plaintiff thought it was not open to him to go into evidence of that description, and that was the reason why he objected to the reception of evidence on the part of the defendant to shew that the plaintiff was guilty of a nuisance. As the evidence which was received in fact proved that the plaintiff was guilty of obstructing the highway, I should have directed the jury to assess only two pence damages.

The proper course will be to set aside the verdict, and grant a new trial without costs.

New trial, without costs.

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## SECORD V. THE GREAT WESTERN RAILWAY COMPANY.

10 & 11 Vic., ch. 6—*Measure of damages.*

In actions under 10 & 11 Vic., ch. 6, brought for the death of a person killed by accident, the court will interfere if the damages assessed are clearly excessive.

But *held*, that under the circumstances of this case £3000 was not an exorbitant compensation for the widow and three children of the deceased.

*Semble*, that the mother in this case could have no claim.

This was an action brought under the statute 10 & 11 Vic., ch. 6, by the plaintiff, as administratrix of her husband, who was killed by the railway accident occasioned by the breaking of the bridge over the Desjardins Canal on the 12th of March, 1857. It was brought on behalf of herself, the mother of the deceased, and his three sons, of the respective ages of seven, five, and two years.

The defendants allowed judgment to be entered against them by default, and at the assessment of damages, which took place at the last assizes held at Brantford before *Burns, J.*, the facts appeared as follows:—

The father of the deceased died at about the age of 50, and had been a hard drinker in his time. When he died he left the deceased, his eldest son, then about 18 years old, his heir, and devised to him forty acres of land in the township of Niagara, situated not far from the town. He died involved, and subjected the land to a life estate to his widow, the mother of the deceased. The deceased was stated to be a temperate and steady young man, took charge of the property, worked the place, paid off the debts and charges upon it, and supported the family. He subsequently purchased 45 acres for \$500, and 50 acres for \$1200, making thus a farm of 135 acres in all, which was estimated by the witnesses to be worth \$12,000 or \$14,000 at the time of the decease of the plaintiff's husband. He was an industrious farmer, and was said to have sold somewhere about £400 worth of different kinds of grain from the farm in the year 1855. In that year he purchased a farm consisting of 167 acres not far from Brantford, for which he had agreed to pay \$10,000, and of which he had paid \$2,000, the remainder being secured by mortgage upon the property. He rented the farm near Niagara for \$500 a year, and moved



to the other property, where at the time of his death he was engaged in the putting up and preparing to carry on a saw mill. He was about 38 years of age when killed, and the plaintiff, his widow, about 30.

At the trial the plaintiff's counsel asked the learned judge if he thought the mother of the deceased was entitled to claim damages to be assessed on her behalf, and his lordship being of opinion that she had no legal right to claim damages under the circumstances, he then asked for permission to strike out her name, which was done. The defendant's counsel objected to the amendment being made, but assented, on condition that he should have the benefit of the objection afterwards in term.

The jury assessed the damages: £600 for the plaintiff; and £800 to each of the sons, making in all £3,000.

*Connor, Q. C.*, obtained a rule *nisi* to shew cause why there should not be a new assessment of damages, on the ground that the damages assessed were excessive, and also because the record was improperly amended at the trial by expunging the name of the mother of the deceased.

*M. C. Cameron* shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

It is unnecessary to determine whether under the circumstances of this case the mother of the deceased could have been allowed to share.

The counsel for the plaintiff desired the amendment on its being intimated that the mother had no claim in this case, where the deceased was married and had children, and his mother had been provided for by her husband's will. It can be of no consequence to the defendants how the compensation is distributed.

Then as to the amount of damages. What are the consequences of the death of the person killed, first to his widow, next, to his children?

The widow, for all that we see, will have her dower in the two tracts of land purchased by her husband near Niagara. He died intestate, and she can have no other claim upon it. I take it she has no legal claim to dower in the land near

Brantford, if her husband, when he took the title, instantly mortgaged it back to secure the purchase money. (a) Her husband seems to have been an industrious, thriving man, engaged in a lucrative business, and managing it successfully, and he was in the prime of life.

I do not think we can say that £600 is too great a compensation to his widow for the loss of the support which she would have derived from his exertions. The Niagara property rents for £120 a year, which gives us some idea of the probable value of her dower. It cannot be nearly equivalent to the support she was deriving from her husband's exertions.

As to the children. By their father's death they became entitled as tenants in common to his property at Niagara, and if there are means of paying off the mortgage on the land near Brantford they will also acquire that. Whether they would eventually have been better off if their father's life had run its natural course, we have no means of determining. It must be mere conjecture. He might have become extravagant or intemperate, and squandered his property, or from too great eagerness to grow rich might have lost it by grasping at too much, or he might have died from natural causes within a year or month, leaving his family no better off than he did leave them when carried off by this sad accident. I confess myself utterly unable to make a satisfactory computation of the pecuniary loss sustained by his widow or his children.

It does not, therefore, follow that this court cannot and should not interpose in any such case, when they see that the jury has awarded a compensation extravagantly excessive. We shall feel bound to do so in any clear case of that kind, till the legislature thinks fit to restrain the courts from such an interposition, and shall provide that the verdict of the jury, as it regards amount, shall be final.

But we cannot say that we look upon this verdict as one that we think would strike every reasonable and intelligent man as excessive. On the contrary, we believe it to be probable that the life of such a man as the deceased is proved to

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(a) But see *Potts v. Meyers*, 14 U. C. R. 499; *Lynch v. O'Hara*, 6 C. P. 259.

have been, taking the average duration of life at his age, might be worth more than £3,000 to his wife and children.

The case of *Blake v. The Midland Railway Co.* (18 Q. B. 93) shews the difficulty that courts and juries must be under in carrying the statute satisfactorily into effect.

We must, however, apply it as well as we can, and it is evident that in applying it the court must have great difficulty, except in clear and extreme cases, in interfering with the province of the jury.

Rule discharged.

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### SMITH V. DOAN.

*Agreement for sale of land—Failure by vendee to give notes on the day named—Effect of upon his right to sue on the agreement—Preparation and tender of conveyance.*

Defendant agreed to sell to the plaintiff certain lands for £400, £100 by two approved notes to be given on the 16th of May, and the remaining £300 to be secured by mortgage; and that the defendant, on receiving said notes on the 16th of May, should execute and deliver to the plaintiff a good and sufficient deed of the premises. In an action on this agreement it appeared that the plaintiff was not ready to give the notes until the 19th.

*Held*, that on that ground he was precluded from recovering damages from the defendant for non-performance of the agreement on his part.

*Seem*, that under the agreement the deed was to be prepared by the plaintiff, the words, "execute and deliver to the plaintiff," not indicating a contrary intention.

The plaintiff declared that, by an agreement under seal, made on the 18th of August, 1856, between him and defendant, the defendant agreed to sell to the plaintiff a certain tavern stand and land then occupied by one Wilson Crow, in the village of Queensville, for £400, to be paid by the plaintiff as follows: that is to say, £100 by two approved joint notes, which should be given on the 16th of May, 1857, for £50 each, one of them to be payable in one year, and the other in two years from that date, with interest, and the remaining £300 to be secured by mortgage upon the said premises immediately after the deed thereof should be given to the plaintiff, payable in twelve equal annual instalments, with interest on the whole sum remaining due at the time of each payment; and that it was agreed that the defendant immediately after receiving the said joint notes on the said 16th day of May, should execute and deliver to the plaintiff a good and sufficient deed of the said premises free from all incumbrances whatever, and containing the usual covenants,

and that the defendant should retain possession of the premises until the said 16th of May, when he should deliver the same up to the plaintiff, upon his complying with the terms of the said agreement, and that in case the defendant should refuse or neglect to comply with the agreement on his part, he should forfeit and pay to the plaintiff £100 as damages.

The plaintiff then averred that he had been at all times ready and willing, and offered to do and perform all that was to be performed on his part, of which readiness and willingness the defendant always had notice, and was requested by the plaintiff to perform the agreement on his part, but that defendant had neglected and refused to perform his said agreement, and had sold and conveyed the premises to one Fitzpatrick for £600, and had deprived the plaintiff of the profit which he would have derived from the completion of the agreement, &c., to the plaintiff's damage of £300.

The defendant pleaded, that from the making of the said agreement till and on the 16th day of May, he was at all times ready and willing to convey the premises to the plaintiff, but that the plaintiff was not ready or willing, at any of the said times, to receive the said conveyance, or to give to the defendant the said two joint notes, or the said mortgage, upon the giving of the said conveyance to the plaintiff.

The plaintiff took issue on this plea.

At the trial, at Toronto, before *Draper*, C. J., the evidence was to this effect: Crow, the defendant's tenant, was still occupying the premises on the 16th of May, 1857. On that day the plaintiff went there, and said to Crow that he had come to fulfil the agreement between him and the defendant.

On the 19th of May he went again to Crow's, and on that occasion he took one Paulmetar with him, who he said would indorse notes for the £100. The defendant was not there, and it was not proved that he had notice on either day of the plaintiff being at Crow's. Paulmetar swore that he went with the plaintiff on the 19th day of May, and would have indorsed the notes.

It was proved that the defendant, on the 28th of May sold the land to one Fitzpatrick.

The defendant gave evidence that about a month before



the 16th of May the plaintiff and he went together to the person who had prepared the agreement between them, and as it was stated that the plaintiff could not give the indorsed notes required, it was then agreed that the defendant should make a title for the property to the plaintiff, and take back a mortgage for the whole £400, but before the third party (Soles) could prepare the deeds, the plaintiff went to him and told him not to draw them. Soles swore that the plaintiff did not go to him on the 16th of May, but that he went to him on the 19th of May, and got a copy of the agreement from him, and requested him to remember that he had called there then. He asked if the defendant had been there, but did not say that he was waiting on the defendant, or wanted a conveyance. It was proved that the defendant was at his own house on the 16th of May, near Crow's, working on his farm.

The learned Chief Justice left it to the jury to say whether the plaintiff had proved that he had been ready and offered to give the notes and the mortgage, as he had alleged, remarking that he thought the evidence to that effect very feeble.

The jury, however, gave the plaintiff a verdict for £100.

*Read* obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection; or to arrest the judgment, because the declaration contained no averment of the plaintiff having tendered a conveyance of the premises to the defendant to be executed by him. He cited *Poole v. Hill*; 6 M. & W. 835; *Lancashire v. Killingworth* 2 Ld. Raym. 686, *Wade's case*, 5 Co. 114; *Glazebrook v. Woodrow*, 8 T. R. 366; *Heare v. Wadham*, 1 East, 619.

*Eccles*, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We think there should be a new trial without costs.

The plaintiff had no right to look for a deed until he gave two approved joint notes to the defendant for £50 each. Then he could call for a conveyance, and secure the remaining £300 by mortgage on the land.

We think, under the agreement, as it is set out, the deed was to be prepared by the plaintiff—that is, by the

purchaser—as is usual, when the writing does not indicate a contrary intention, as we think it does not here, because the defendant does not engage to *convey* or *make* a title or conveyance, upon the notes being given for the £100, but only that he will then *execute* and *deliver* a deed, which means no more, we think, than that he will execute. It is not necessary in this case to determine that point, however, and we only state our present impression. It is clear that on the 16th of May, the day named, the plaintiff ought to have been ready with such indorsed notes for the £100 as the defendant would approve of. Whoever was to prepare the deed, that was a thing to be done first; and there really can be no doubt upon the evidence that the plaintiff did not produce the notes on that day, and was not prepared to do so till the 19th, if he was then prepared. Upon the issue joined the defendant in a court of law was entitled to succeed, for the plaintiff, by not being ready on the day named with his notes, lost his strict legal right to demand a deed at any time, and whatever success he might meet with in equity, he could not in a court of law recover damages against the defendant for not fulfilling an agreement in which the plaintiff himself had failed.

We think there must be a new trial without costs.

Rule absolute.

### SARAH HALL V. JOHN GRANTHAM HALL.

*Writing—Construction of—Lease or release—Ejectment.*

A. died, leaving the plaintiff, his widow, and defendant, his heir at law. The plaintiff being in possession of part of the property, the defendant executed the following instrument under seal: “Know ye, all men, that I, John G. Hall, do bind myself, my heirs, executors and assignees, in the sum of £300 to let my mother, Leah Hall, retain quiet and peaceable possession of the lot of land now in her possession, the same being 50 acres more or less, for the term of her natural life.”

*Held*: lease for life, and that the plaintiff might maintain ejectment.

*Sembrace*, per *Burns, J.*, that the writing might also be supported as a release.

EJECTMENT, for the east quarter of the east half of lot No. 16 in the 10th concession of the township of Oro, except 7 acres thereof, which was composed of two parcels,  $2\frac{1}{4}$  acres adjoining the east line of the fifty acres, and a field on the west side of the fifty acres, containing about  $4\frac{3}{4}$  acres.

By the plaintiff's notice attached to the record she claimed title by virtue of a certain lease, or other document made by the defendant to her ; also as devisee under the will of her late husband, Humberston Hall.

The defendant, by his notice, besides denying the plaintiff's title, claimed title in himself under an assignment and release by the claimant of any lease or other document alleged to be made by the defendant.

At the trial at Barrie, before *Burns, J.*, the plaintiff attempted to prove a will made by her late husband, Humberston Hall.

It appeared that he had made a will of some kind, but whether affecting the land in question, or what the contents of it were, did not appear, because the proper searches had not been made to let in secondary evidence. The plaintiff abandoned that title, and went upon the other ground. It appeared that the plaintiff lived upon the land : that is, occupied the whole 100 acres after the death of her husband, with the family, the defendant being the eldest son and under age. The defendant continued to live with her for some time after he became of age, and subsequently went to live upon the west half of the 100 acres, leaving the plaintiff in possession of the east half. There was part of the purchase money due to the crown on the whole 100 acres, and it was arranged that the defendant should take possession of the west half, and pay up the balance due on the whole. The plaintiff and defendant got into disputes afterwards about the property, and they called in a neighbour to prepare a writing to settle the matter between them, and he prepared an instrument as follows, *verbatim* :

" Know ye, all men, that I, John Grantham Hall, yeoman, of the Township of Oro, County of Simcoe, Canada West, do bind myself, my heirs, executors and assignees, in the sum of three hundred pounds, provincial currency, to let my mother Leah Hall retain quiet and peaceable possession of the lot of land now in her possession, the same being fifty acres, more or less, for the term of her natural life.

" Signed, sealed, and delivered.

this 10th day of July, 1851.

" JOHN G. HALL. [L.S.]"

At the time of the execution of this instrument the plaintiff was in possession of the part sought to be recovered in this action. There was a house upon it, in which she then lived, and the defendant lived in another house on the west part. The witness who drew the paper swore that the intention of both parties was that the document should apply to that part of the lot of which defendant then was and previously had been in possession. The plaintiff had let the land to a tenant, who cultivated it for some four years, and he also lived part of the time in the house. In 1855 the plaintiff went to stay for a time with another son, but returned again and lived in the house, and again returned to her son's place. The plaintiff had no one in possession of the land, it seemed, during 1855 or 1856, and the defendant resumed possession of it. In August, 1856, the plaintiff sent another son to look after the premises, and then he found some children playing in the house, having found their way in by the window. He put them out and fastened up the house, and on speaking to the defendant about the land, he said he had taken possession and that no one should interfere with him, except by course of law. Since that time the defendant had taken possession of the house, and was living in it at the time of the trial.

On this evidence the learned judge directed the jury to find for the plaintiff with leave to the defendant to move to enter a verdict for him, if the court should be of opinion that the instrument set out could not operate by way of release from the defendant to the plaintiff so as to give her an interest against him in the land.

*McMichael* obtained a rule, according to the leave reserved. He cited *Shep. Touch.* 326, 273.

*M. C. Cameron* shewed cause, and cited *Platt on Leases* 599; *Cumming v. Hill* 6 O. S. 303.

ROBINSON, C. J.—There can be no doubt that if the plaintiff were now in possession under this instrument, and the defendant were endeavouring to turn her out, he must fall, for he would not be allowed to recover in ejectment in the face of this solemn deed executed by himself. As in the



case of *Right ex dem. Green v. Proctor*, (4 Burr. 2208) it would be held that he could not recover against his own covenant. Then the only question there can be in this case, arises from the fact that Mrs. Hall is not here defending the possession merely under that instrument, but is seeking to recover under it as a plaintiff in ejectment.

I have doubted whether it would be sufficient for that purpose, but my opinion now is that it is sufficient.

In that same case, of *Right ex dem. Green v. Proctor* Mr. Justice *Yates*, in remarking upon the writing; which was in substance similar to the present, says of it, "Even as a license to inhabit it amounts to a lease, and it appears most plainly to be intended that he was to reside in the house."

Less cannot be said of the present instrument; and if we can properly look upon it as a lease, then there can be no longer a doubt that the plaintiff can maintain ejectment upon it.

Now I have no doubt that a lease may be made without words of present demise; and that if one covenants to allow another to possess an estate for a certain time, without any thing to shew that the matter was clearly intended to rest merely on the footing of an agreement until a lease should be executed, that will amount to a lease. *Tisdale v. Essex* (Hobart 34) is an express authority on that point, and it is nowhere disputed.

Thus, if the defendant had covenanted, in consideration of a certain rent expressed, to allow his mother to occupy for her life, that would have been a lease for life, and not the less so because he binds himself in a certain penalty to let her have quiet and peaceable possession.

It is not uncommon to see a penalty inserted in the conclusion of an instrument which is clearly meant to be a lease, binding each party to keep his respective covenants; and if in this instrument a rent had been reserved, I do not see how a doubt could be raised, for here the plaintiff was to be allowed to occupy for a certain time; that is during her life. It comes then to this; may there not be a valid lease without a reservation of rent? That is the only point, and

it seems to be in effect determined by what I have cited from the case of *Right ex dem. Green v. Proctor*, that there may be ; and there is abundance of other authority to the same effect.

In *Hall v. Seabright* (1 Mod. 14) the plaintiff had licensed the defendant to enjoy the house till such a day, and this was pleaded in an action of trespass as license. Saunders demurred, because it should have been pleaded as a lease, he said, and not as a license, being a certain present interest. *Twisden, J.*, said : " It is true it is said that if one doth license another to enjoy his house till such a time, it is a lease ; but whether it may not be pleaded as a license, I have known it doubted." In *Challoner v. Davis* (1 Ld. Raym, 404) the doctrine that a license to possess (as I suppose for a certain time) must be pleaded as a lease, is affirmed. In *Sheppard's Touchstone*, p. 268, the things necessarily required in a lease are distinctly enumerated, among them is the requisite that a certain term must be created by it, as in this case for life ; and it is added, " But whether any rent be reserved upon a lease for life, years, or at will, or not, is not material, except only in the cases of leases made by tenant in tail, husband and wife, infants, and ecclesiastical persons ;" and the very learned editor of a modern edition of this work, Mr. Preston, adds explanations of the reasons of these several exceptions, thereby adding his authority to what had been laid down as the general principle.

I refer also to 2nd Keb. 561, to Bac. Abr. "Lease" K. citing *Bradston v. Buck*, and to 15 Viner's Abridgment "License" A., and to Knight's case 5 Co. 55 *a*.

I concluded from what I have cited that as between the parties this deed operates as a lease, though no rent is reserved and no consideration expressed in it, being an assurance for a certain term, and therefore not a mere lease at will. That it was not in fact voluntary, and without consideration, I have little doubt from the tenor of the instrument itself, as well as from the other evidence, although the consideration is not stated, as indeed it never need be.

In my opinion the rule to enter a verdict for defendant should be discharged.

BURNS. J.—At the trial I was under the impression that the paper given by the defendant to the plaintiff might be supported as a release to her of the estate in the fifty acres, of which it appeared she then had the possession, and upon consideration of the subject I am inclined to that view still. The possession which she then had was a tenancy at will of that fifty acres, and the defendant, her son, was entitled to the fee. A release may be made to one who is but tenant at will, if proper words be used. The words usually made use of were—*remisisse, relaxasse, et quietum clamasse*, but other expressions were equally effectual; such as *renunciare, aquietare, &c.* The word used in the present instrument is, that she shall *retain* quiet and peaceable possession of the land. This implies that she had then possession, and the defendant covenants that she shall retain it during her natural life. See Sheppard's Touchstone, Ch. 19. I incline to the view that it may be supported as a release, because one of the ingredients of such an instrument is, that it shall not only be sufficient to make a release, but also to raise and create a new estate.

Now there is another view to take of this paper, and it is whether it may not be treated as a good lease by the defendant for the life of the plaintiff. It is said in the Touchstone, ch. 14, that it is not essential for the validity of a lease that any rent be reserved, except in certain cases. That being the case, it only remains to be considered whether this instrument is sufficient to create an estate in the plaintiff. In *Drake v. Munday* (Cro. Car. 207) it was held that an agreement that the defendant "*shall have and enjoy*" was sufficient to create a lease. That was confirmed in *Doe dem. Jackson v. Ashburner* (5 T. R. 163). It is said that a license to enjoy or inhabit a house amounts to a demise of it. *Bac. Abr.* "Lease" K.; 2 Lev. 194; *Right v. Proctor* (4 Burr. 2208).

In this case I think the words used are very much stronger, for the defendant covenants that the plaintiff shall retain what was then in her possession during her natural life. It appears to me the effect of this was to create a new term which had an immediate commencement, and a sufficiently determinate ending.

Viewed, therefore, either as a lease for life, or as a release for life of the estate, which she, the plaintiff, then had in possession, it is sufficient to create a new estate, which will enable her to maintain ejectment.

MCLEAN, J., concurred.

Rule discharged.







# A DIGEST

OF

## ALL THE REPORTED CASES

DECIDED IN

## THE COURT OF QUEEN'S BENCH,

FROM HILARY TERM, 20 VICTORIA, TO  
MICHAELMAS TERM, 21 VICTORIA.

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### ACTION.

*See* DISTRESS. — NEGLIGENCE. —  
RAILWAYS AND RAILWAY COMPANIES, 5, 6, 8, 9. — ROAD COMPANIES. — VENDOR AND VENDEE.

*Obstruction of navigable river—Right of action—Not guilty “by statute”—River Rouge.*]—*Declaration*, that the defendants, in constructing their Railway, built a bridge across the river Rouge, so as to impede the navigation; that the plaintiff owned land on the river above the bridge, and by reason thereof was entitled to the free use of the river thence to the lake: that vessels had been accustomed to pass up and down to his land, but could no longer do so; and that the trade of the river had been destroyed, and his land in consequence diminished in value. *Plea*, not guilty, “by statute.” *Held*—1. That the declaration did not state any injury peculiar to the plaintiff, which could entitle him to maintain an action, but that the proper remedy was by indictment. 2. That as the land had been all the time in possession of a tenant, the plaintiff as reversioner could not recover upon the case stated

in the declaration. 3. That both these objections were open to defendants under the plea of not guilty “by statute.” The Rouge found to be a navigable river. *Small v. Grand Trunk Railway Company*, 283.

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### ADDING PLEAS.

*See* CONTRACT, 2.

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### ADMISSION.

*Of Title.*]—*See* EVIDENCE.

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### AFFIDAVIT.

*For filing assignment of chattels in trust for creditors.*]—*See* ASSIGNMENT, 5, CHATTEL MORTGAGE.

*See* COMMISSION FOR TAKING AFFIDAVITS.

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### AGREEMENT.

*See* CONTRACT.

U. C. Q. B.

## AMENDMENT.

*By adding plea at trial.*—See CON-TRACT, 2.

See COVENANT, 1.

Where a judge's order has been obtained to alter the *venire facias* to another assize, it is no objection that the trial took place without the alteration having been actually made. *Hawkins v. Patterson*, 158.

## APPEAL.

See ELECTIONS, 1.—NEW TRIAL, 2.  
—RAILWAYS AND RAILWAY COMPANIES, 3.—SCHOOLS, 2.

*Appeal from Sessions*—13 & 14 Vic., ch. 54.]—*Quere*, whether a party, having appealed to the Quarter Sessions, under 13 & 14 Vic., ch. 64, from a conviction by a justice of the peace, has any right of appeal from the decision of that court. If such right exists the conviction must be returned to the court above, on entering the appeal. *The Victoria Plank Road Company v. Simmons*, 303.

## ARBITRATION AND AWARD.

See RAILWAYS AND RAILWAY COMPANIES, 4, 9.—SCHOOLS, 2.

1. *Award made without hearing counsel.*—Where counsel had agreed to submit their views on a legal point in the case to the arbitrators in writing, and the arbitrators decided without waiting to hear from them, the award was set aside. *Perlet v. Perlet*, 165.

2. *Death of Plaintiff before judgment*—*Proceeding ex parte.*—Where a plaintiff, in whose favour an award is, dies after the award, but before

judgment, the suit does not abate, but judgment may be entered under the 17 Car. II., ch. 8. No execution, however, can issue in the name of plaintiff's executor without reviving the judgment. Where a verdict was taken subject to arbitration, and an award made on the first day of the term following, on which judgment was entered soon after that term. *Held*, not too soon. *Held*, that upon the facts stated below, the arbitrator was justified in proceeding *ex parte*. *Gladwin v. Chilcote* (9 Dowl. 550), and *Scott v. Van Sandau* (6 Q. B., 237), remarked upon. *Proctor v. Jarvis et al.*, 187.

3. *Enlargement of time for making award*—*Attempt to vary bond of submission by parol agreement*—*Pleading.*—*Declaration*, first count, that the defendant, by his bond, agreed that one C. should abide by the award of arbitrators, respecting certain matters referred to them in difference between C. and the plaintiff, provided the award should be made before the 6th of June then next: that the arbitrators, with the consent of C., of the defendant, and of the plaintiff, enlarged the time for making the award to the 1st of July, and made it on the 12th of June, alleging non-performance of such award. *Second count*—That C. requested the plaintiff to extend the time, and the plaintiff, on such request, and in consideration, that the defendant promised him to continue bound for the performance of said award, and that C. or the defendant would perform the same, agreed, for the convenience of said defendant and C., that the time should be extended; setting out the award, &c., as in the first count. *Held*, on demurrer, both counts bad. *Sexton v. Woods*, 585.

## ARREST.

See MALICIOUS ARREST.

## ARREST OF JUDGMENT.

See VENDOR AND VENDEE, 1.

## ASSESSMENT.

See RAILWAYS AND RAILWAY COMPANIES, 3.—SURVEY, 1.—TAXES.

## ASSIGNMENT.

See COVENANT, 1, 3.—ESTOPPEL, 3.

1. *Fi. Fa.*—*Chattel mortgage—Priority.*—On the 9th of January M & Co. mortgaged certain goods to R., which on the 19th the sheriff seized under a writ of *fi. fa.* On the 22nd of February, while the sheriff was in possession, M. & Co. made a bill of sale to the plaintiff. The mortgage to R. was satisfied after the seizure, and before the sale by the sheriff (which took place by consent of all parties), but whether before or after the execution of the bill of sale to the plaintiffs did not appear. *Held*, that the *fi. fa.* was entitled to prevail over the plaintiff's claim. *Taylor et al. v. Jarvis*, 21.

2. *Assignment—Construction of—Return to Fi. Fa.*—By an assignment of all the assignor's "stock in trade, goods, wares, merchandise, groceries, household furniture, and moveable personal property in, upon, or belonging to his store, dwelling, warehouse, wharf and tenements in Ontario-street, in the City of Kingston, or elsewhere (save and except the excluding the goods and chattels of the said J. F.)" the assignor, "in the possession, control, or charge of David McWhirter,

of Adolphustown only), and also all his stock in the Kingston Marine Railway Company." *Held*, that shares in the Bay of Quinte Steamboat Company would not pass. The sheriff having, however, sold such shares under execution and received the money, could not return *nulla bona*, on the ground that they were not properly saleable under the writ. *Hewitt v. Corbett*, (*Sheriff*), 39.

3. *Bill of sale—Execution—Time allowed for filing—Priority—Change of possession—Land and chattels assigned together*—12 *Vic.*, ch. 74, 13 & 14 *Vic.*, ch. 62.]—An execution coming in before the filing of an assignment which requires to be filed, is entitled to prevail, though a reasonable time for filing may not have elapsed since the execution of the assignment.

Where the land and buildings on which chattels are, are conveyed by the same deed as the chattels, the assignee, though held to be in possession of the land by virtue of his deed, is not to be looked upon as having taken possession of the chattels also, so as to dispense with filing the assignment: he must either actually take possession of the buildings, or the assignor must go out.

C. owning a mill, with the machinery in it, assigned the whole property, both real and personal, including the lumber, stock in trade, &c., on the premises, to the plaintiff, in trust for himself and other creditors. The deed was registered in the registry office on the day of execution, *but was not filed in the county court*, when, *on the day after the execution*, the sheriff seized the machinery, &c., under a *fi. fa.* against goods, nor was it afterwards filed. The assignor did not leave the mill, but



continued to work it with his men for the benefit of the assignee. *Held* 1. That there was not such an actual and continued change of possession as to dispense with filing the assignment, and 2. That for want of such filing the *fi. fa.* must prevail.—*Carscallen v. Moodie* (Sheriff) and *Dafoe*, (Deputy Sheriff,) 92.

4. 12 Vic., ch. 74—*Evidence of actual and continued change of possession, Held insufficient. McLeod v. Hamilton* (Sheriff,) 111.

5. Assignment of chattels in trust for creditors—*Defect in affidavit*—13 & 14 Vic., ch. 62—*Change of possession as to part—Effect of.*—An affidavit accompanying an assignment for registration stated that the deed was not made for the purpose of enabling the assignor (instead of the assignee, as required by the statute) to hold the goods against creditors. *Held*, bad. *Quere*, per *Robinson C. J.*, whether, when as to part of the goods assigned there has been no change of possession, the assignment unless filed is not void altogether, although that possession of other goods included in it has been changed. *Semble*, per *McLean, J.*, that assignees of goods, in trust to sell and divide the proceeds among creditors, cannot properly take the affidavit required by 13 & 14 Vic., ch. 62. *Olmstead et al. v. Smith et al.*, 421.

#### ASSOCIATE JUDGE.

*Absence of at trial of criminal.*—*See* CRIMINAL LAW, 2.

#### ASSURANCE.

*See* INSURANCE.

#### ATTORNEY.

*See* PLEADING, 4.

#### AWARD.

*See* ARBITRATION AND AWARD.

#### BAIL.

1. *Bail bond—Pleading—Nul tiel record—Proceeding in action, effect of.*—DEBT on bail bond. *Plea*, that the principal put in bail to the action according to the condition. *Replication*, that he did not cause special bail to be put in for him in said action. *Held*, that this was an issue of *nul tiel record*, which could not be tried by a jury. It appeared that the plaintiff in the original action had proceeded to judgment. *Quere*, whether this was not a waiver of special bail; and whether, if so, defendant could rely on his plea as above, or should have pleaded the facts specially, or have applied to the court to stay proceedings. *Dusolme v. Hamilton*, 183.

2. *Bail to the sheriff—Waiver of special bail—Staying proceedings.*—The defendant in the original action having given bail to the sheriff, the plaintiff proceeded with the suit and obtained judgment. *Held*, that by so doing he had waived bail above, and that he could not afterwards take an assignment of the bail bond, and proceed against the bail. *Dusolme v. Hamilton*, 574.

3. *Bail Bond—Joint and several liability.*—On a joint and several recognizance of bail, one of the cognizors may be sued alone. A plea that defendant was jointly bound, means that his undertaking was joint only, not several. *Ross et al. v. Jones*, 598.

## BAILIFF.

See DISTRESS.

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## BANKRUPT.

See SET-OFF.

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## BILL OF SALE.

See ASSIGNMENT.

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## BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Consideration*—*New trial as to indorser only.*]—Where the indorser placed his name upon the note while in blank, there being no maker's name attached to it, nor any sum of money nor payee expressed in it, and it appeared that the name of the maker was afterwards signed without authority: *Held*, that the indorsee suing upon such note must shew himself a *bona fide* holder for value. In an action against maker and indorser, a new trial was granted as to one defendant, and the verdict left to stand as to the other. *Hanscombe v. Cotton*, 42.

2. *Cancellation — Pleading.*]—Assumpsit on common counts. *Plea*, as to £227, parcel, &c., that the plaintiffs, in payment of that sum, drew on intestate in favour of M. or order, which defendant, as administratrix, accepted; that after such acceptance, and while M. was the holder, he, M., cancelled the said bill and returned it to defendant. *Replication*, that M. received such bill as plaintiffs' agent: that while he held it, defendant being entitled to certain insurance moneys for the loss of the goods for which said bill was drawn, and it being

customary for plaintiffs in such cases to receive the insurance moneys, and apply them in the payment of the goods, and M. being aware of such custom, and presuming that the insurance moneys would be received by the plaintiffs, returned the said bill to defendant as cancelled, without intending to discharge defendant unless such insurance money should be paid: that said insurance moneys were not paid to plaintiffs; and the price of said goods, and the said bill, still remained unpaid. *Held*, on demurrer, replication bad. *Waters et al. v. H. S. Lyon, administratrix of William R. R. Lyon*, 194.

3. *Canada Grand Trunk Telegraph Co.—Liability of president and secretary on promissory note*—16 *Vic.*, ch. 10, sec. 8; 12 *Vic.*, ch. 10, sec. 5, sub-sec 24.]—"Toronto, February 5th, 1855. Six months after date, for value received, we promise to pay to A. K. Boomer, Esquire, or his order, at the City Bank, Montreal, the sum of four hundred and twenty-four pounds sixteen shillings and two pence, currency, with interest from date, Geo. H. Cheney, President Gr. Trunk Telegraph Co. F. A. Whitney, Secretary C. Grand Trunk Telegraph Co." The seal of the company was affixed. *Held*, that the makers were not personally liable on the above instrument, as being their promissory note. *Quære*, whether the company were liable. The statute under which the company is incorporated, enacts that all evidences of debt issued by them shall be issued and signed by the president and treasurer. *Sem-ble* per *Robinson*, C. J., that this is directory merely, and that even if the secretary who signed in this case was not the treasurer as well,

it would be sufficient. Per *Burns, J.*, that the seal being used dispensed with the signatures of the president and secretary, the object of the enactment being to enable the company to make such contracts, if they should desire, without their seal. *The City Bank v. Cheney et al.*, 400.

4. *Promissory note—Indorsement by defendant of negotiable note not indorsed by [payee]—Pleading.*—Declaration—That one S. & R. being indebted to the plaintiffs, on the 18th of April, 1856, by their promissory note now overdue, promised to pay to the order of the plaintiffs £150, three months after date; and for the better and more perfect securing and guaranteeing the payment thereof to the plaintiffs, delivered the said note to defendant, who endorsed the same to the plaintiffs; and the said note was duly presented for payment and dishonoured, whereof defendant had notice, but did not pay the same. Held, bad as shewing no cause of action. *Moffatt et al. v. Rees*, 522.

5. *Promissory note—Action by plaintiffs as indorsees, being also payees, against indorser—Plea setting up their liability over to defendant—Replication—Evidence.*—Declaration, by G. M. & Co., on a promissory note made by S. & R., payable to G. M. & Co. or order; indorsed by them to defendants and by defendant to plaintiffs. Plea, that G. M. & Co. are the plaintiffs, and payees of the note, and the same person who indorsed it to defendant, and are liable to defendant as such indorsers, if he should be made to pay. Replication, that the plaintiffs' names were used as payees for form only; and it was

understood by all parties to the note, that although nominally made payable to the plaintiffs, it was substantially to be paid to defendant, because, by a special agreement between plaintiffs and defendant, notwithstanding the form of the note, the plaintiffs were not to become liable to defendant by indorsing to him. The evidence shewed that the note was given to enable the makers to get goods on credit from the plaintiffs, and that defendant knew he was endorsing for that purpose. Held, that the plaintiffs were entitled to recover. *Moffatt et al. v. Rees*, 527.

6. *Promissory note—Notice of non-payment—Promise to pay—Waiver.*—A promise to pay made after action brought will avail the plaintiff as well as if made before. A conditional promise by an indorser to pay in land, or see that the plaintiff should lose nothing, is sufficient to waive any objection as to notice of non-payment. *Burke v. Elliott et al.*, 610.

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## BOND.

See EJECTMENT, 1.—MUNICIPAL CORPORATIONS, 2.—LEASE.—RELEASE.

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## BOUNDARY LINES.

See SURVEY.

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## BRIBERY.

See ELECTIONS, 1.

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## BRIDGE.

*Liability of Road Companies for accidents caused by use of unfinished bridge.*—See ROAD COMPANIES, 1.



## BY-LAW.

*To grant licenses to sell liquors.*]—See  
MUNICIPAL CORPORATIONS, 1.

See RAILWAYS AND RAILWAY COMPANIES, 1, 2.—STATUTE LABOUR.

## CARRIERS.

See SHIPPING, 2.

*Carriers by water—Loss of ship—Expense incurred by master in saving and forwarding the cargo—Liability of freighters therefor—Lien.*]—Where a vessel carrying goods is stranded and lost by stress of weather, the master may, to save the cargo, employ another vessel to take it to the place of destination, and the owners of such goods will be liable for any extraordinary expense so incurred in addition to the freight.

*Declaration* against defendants as common carriers, charging that the plaintiff delivered to them certain goods, to be carried from Montreal to Cobourg, and there delivered to the plaintiff within a reasonable time, dangers of navigation excepted, and that they did not so safely carry or deliver said goods, although no dangers of navigation prevented, but through their negligence the same were wholly lost to the plaintiff. It appeared that the goods were shipped at Montreal, with the goods of several other persons, on board defendant's vessel, which, without any negligence on the master's part, was driven on shore between Kingston and Toronto, and became a total loss. The master, in order to save the goods procured another vessel, by which they were taken to Cobourg; and the defendants there, in addition to the freight agreed on, claimed from the plaintiff

his share, upon an average, according to the value of the goods of the several freighters which were saved, of the charge of transporting his goods from the wreck to Cobourg. The plaintiff paid the charge for freight only, but refused to pay the extra claim or execute an average bond, and the defendants detaining the goods, he brought this action. *Held*, that the plaintiff was liable to such charge, and that the defendants had a lien upon the goods for it. *Quære*, per *Robinson*, C. J., whether, if the plaintiff were not so liable, the declaration was properly framed to entitle him to recover. Per *Burns*, J.—The declaration was sufficient, and under a plea of not guilty the defendants could not set up their lien.—*Rogers v. Hooker et al.*, 63.

## CHATTEL MORTGAGE.

See ASSIGNMENT.

*Objections to affidavit for filing—Irregularity in jurat—Initials.*]—Where a witness to a chattel mortgage, given by two persons, swears that he saw both mortgagors execute, when in fact he only saw one, and the mortgage has been registered on such affidavit, it is sufficient. It is no objection that the second christian name of the deponent is not written in full, but the initial only given. The jurat was as follows: "Sworn before me at the Brantford of — in the — county of Brantford, this 13th day of October, A.D. 1855: George W. Malloch, a commissioner for taking affidavits in the Queen's Bench, in and for the said county of Brant." *Held*, sufficient. An affidavit of execution, sworn before the mayor of a foreign town is useless. Affidavits of this nature will not be treated with the same particularity



as affidavits used in proceedings before the court. *DeForest et al. v. Bunnell*, 370.

## COMMISSIONER FOR TAKING AFFIDAVITS.

See SHERIFF.

*Commission for taking affidavits issued for a district—Effect of, after division into counties—*12 Vic. ch. 78, secs. 18, 37.]—K. held a commission for taking affidavits in the district of Wellington, issued in 1848. *Held*, that he might act under such commission in the county of Waterloo, where he was living, being part of the old district of Wellington, and a junior county disunited from the union of Wellington, Waterloo, and Grey. *Quære*, whether the want of authority in the commissioner taking the affidavit of debt can be set up by the sheriff as a defence to an action for escape. *Glick v. Davidson*, 591.

## COMMON LAW PROCEDURE ACT (1856).

See DEATH, 2.—EJECTMENT, 2, 3.—INTERROGATORIES.

## COMMON SCHOOLS.

See SCHOOLS.

## CONSIDERATION.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1—VENDOR AND VENDEE, 1.

*Promise to pay in consideration of forbearance to or discharge of third party—Proof of forbearance or discharge—Forbearance to exercise a doubtful right—How far a good consideration.*]—C. had contracted with

defendants to carry their lumber from Collingwood to Chicago, and had chartered the plaintiff's vessel for that purpose. C. being indebted to the plaintiff, gave him two orders on defendants amounting to £211 10s. 6d. Defendants did not accept the orders formally when presented, but retained them and gave the plaintiff a written authority to draw on them at ten days on the return of the vessel to Collingwood. The plaintiff drew accordingly, but defendants then told him that C. had been overpaid by them, and they refused to accept. It was shewn that the plaintiff had threatened to detain the lumber on its arrival at Chicago, if his claim was not paid, and was told by defendants that it would be satisfied out of the moneys coming to C. on the return of the vessel. *Held*, that the plaintiff was entitled to recover from defendants, for that the evidence sufficiently shewed a discharge of C. by the plaintiff, or a giving time to him until ten days after the return of the schooner, either of which would form a good consideration for defendants' promise. *Quære*, whether plaintiff's forbearing to detain defendants' lumber as he had threatened would have been a sufficient consideration, it being unknown to the parties whether the law at Chicago would allow him such right, though our law clearly would not. *Moberly v. Baines et al.*, 25.

## CONTRACT.

See CONSIDERATION.—COVENANT, 2.—MUNICIPAL CORPORATIONS, 2—PARENT AND CHILD.—VENDOR AND VENDEE.

1. *Agreement—Letters.*]—Defendant, in June, 1855, agreed to employ

plaintiffs' vessel in carrying lumber from Bear Creek to Montreal, until the close of navigation. Defendant afterwards went to England, leaving G. as his agent. Two cargoes had been carried, producing an average freight of £400, and there was yet time for another trip, but G. told the plaintiffs he should not have a third cargo for Montreal. Some conversation took place, but, as the jury found, no agreement was then come to. The plaintiffs afterwards wrote G. as follows: "*September 17th, 1855.* — "Dear Sir,—Mr. Gray spoke of loading the 'Queen' for French Creek or Port Metcalfe this next trip, but which would not at all suit us, as it is by return freight from Montreal we expect the vessel to do any good. She is now loaded for Cleveland, where you can have the opportunity of engaging freight for Montreal, and make the same as good to us as a load of timber at \$150 per *M.*, and which for the two loads we have carried, amounts to £800, say £400 each. Mr. Anderson of Cleveland, to whom the 'Queen' is consigned, is directed to load her for Montreal at the best freight he can get, and which you shall have the benefit of on your contract—i.e., if more than £400, you will have credit for the difference, if less than £400, we shall charge you with the difference, together with £10 per day demurrage for every day beyond three days that the vessel is detained in loading. If you prefer loading with timber for *Montreal*, and consigning to some person who will pay the freight on delivery, you have only to write to Captain Mitchell on receipt of this in course of post, care of P. Anderson, Esq., Cleveland, Ohio, and he will load for you

as you may direct." To this G. answered on the 20th of September: "Gentlemen,—I am in receipt of yours of the 17th instant. I have written to Captain Mitchell to take a load from Cleveland, but you mention in your letter that any thing less for the freight from Cleveland than what you would get for timber from Bear Creek, Mr. Cameron would have to make up, which I think would not be just, for what is it worth to take the vessel from Cleveland to Bear Creek and back? The towing alone would cost over 100 dollars, besides three or four days' time." The plaintiffs, on the 1st of October, wrote again: "Yours of the 20th ultimo came to hand in our absence, and we now beg to say in reply, that when the 'Queen' comes back we can learn from her captain what towage she has saved, which of course you can have the benefit of together with any time saved. You will bear in mind, however, that the tolls from Port Colborne to Montreal are much heavier on grain than on timber: but all things considered you shall be fairly dealt by." The vessel was sent to Cleveland, and while there, G. wrote to the master, telling him that he might do the best he could with her; and he took in a load of corn for Montreal, which brought £170 less freight than a cargo of timber from Bear Creek would have done. *Held*, that the letters contained no agreement on defendant's part to pay such difference; but that the plaintiffs' remedy was on the original contract. *Burns, J.*, dissenting, and holding that by the conduct of the parties the original agreement was put an end to, and that the facts proved, together with the letters, constituted an agreement to substi-

tute a cargo of grain for timber, making a fair compensation for the difference. *McPherson et al. v. Cameron*, 48.

2. *Flour—Action for not accepting—Day of delivery falling on Sunday—Alteration of notice—Measure of damages—Amendment.*—Defendant agreed to purchase from plaintiff 2,000 barrels of flour, to be delivered at a good port on Lake Ontario, *in all June next*, by giving the buyer one week's notice at Toronto, at 37s. 6d. per barrel, payable on delivery. Plaintiff sued for non-acceptance, averring that he was ready and willing, and offered to deliver the flour at Oswego, but defendant refused to accept, and he was consequently obliged to re-sell at a loss. Defendant pleaded that the plaintiff gave one week's notice of delivery to him at Oswego on the 1st of June: that he was ready and willing to accept and pay for the flour there on said 1st of June, *and for a reasonable time thereafter*, but that the plaintiff had not the flour on that day, *nor at any time within a reasonable time thereafter*. It appeared that the plaintiff had given notice of delivery on the 1st of June, but afterwards, on the 31st of May, finding that the 1st would fall upon a Sunday, he notified defendant not to attend then, but on the 11th instead; and that he had attended both on the 2nd and 11th, and was ready to deliver, but defendant was not there to accept. *Held*, that, the plaintiff was entitled to recover and that the measure of damages was the difference between the contract price and what he was afterwards obliged to sell for *at Oswego*. At the trial the Chief Justice refused to allow defendant to add a plea, setting up as a defence that by departing from the

first notice the plaintiff had put an end to the contract. *Brunskill v. Mair*, 213.

3. *Construction of—Lease or agreement for lease—Immaterial issue—Pleading.*—Plaintiff declared that the defendant having leased to him certain premises, undertook to make certain improvements, but failed to do so. Defendant pleaded that he did not lease as alleged. The instrument when produced appeared not to be a lease, although it was so called in the writing. *Held*, that the plea should be taken as being in effect a denial only of the writing as set out, and that the plaintiff was entitled to succeed on the issue. *Held*, also, that the plea offered no defence, the existence of a term not being essential to the right of action. *Cornwall v. Murphy*, 263.

4. *Contract to deliver goods to enable plaintiff to fulfil his contract with a third party—Denial of plaintiff's contract—Refusal to accept part—Pleading.*—The declaration set out that the plaintiff had contracted with one R. to deliver to him 200 firkins of butter, of which defendant had notice; and in consideration that the plaintiff would employ him to procure said butter for the plaintiff, to deliver in performance of the plaintiff's contract, defendant promised to use due diligence in endeavouring to procure the same; but that, although defendant procured seven firkins for the plaintiff, yet he did not use due diligence in procuring the rest, but made default, whereby the plaintiff was unable to keep his contract with R., and lost great profit which he would otherwise have made. Defendant pleaded—1st. That the plaintiff did not contract with R.,



nor had the defendant notice thereof, as alleged. 2nd. That he offered to deliver to plaintiff the said seven firkins so procured for him as alleged, but the plaintiff refused to accept the same. *Held*, on demurrer, both pleas bad. *Robertson v. Hayes*, 293.

5. *Agreement—Construction of—Measurement by lineal feet.*—Where the plaintiff by writing agreed to furnish timber, to be paid for at a certain rate per foot, lineal measure. *Held*, that he was entitled to recover such price per lineal foot according to the length of each stick, not according to the length of a bridge constructed of the timber, and for which it was obtained. *Brown v. Zimmerman, et al.*, 563.

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## CONVEYANCE.

*See* DEED.

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## CONVICTION.

*See* APPEAL.

*Proof of quashing.*—*See* JUSTICES OF THE PEACE.

Conviction by a magistrate for obstructing a highway, and order to pay a continuing fine until the removal of such obstruction. *Held* bad. *Regina v. Huber*, 589.

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## CORONER.

*Coroner's inquest—Irrelevant verdict—Amendment—13 & 14 Vic., ch. 56.*—At an inquest held upon the body of a boy who had committed suicide, the verdict, after finding the cause of death, stated

that from evidence submitted the jury judged that the boy's master, a medical man, had not done justice to him according to his agreement made with the boy's father in Scotland, in regard to his clothing and the labour he had to perform. *Held*, that the latter part of the verdict was relevant and within the province of the jury; and although the evidence seemed to preponderate the other way, the court could not on that account alter the finding. *In the matter of the Inquest upon the body of William Miller, deceased, by Silas W. Cooke, Coroner*, 244

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## CORPORATIONS.

*See* BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.—COURT HOUSE. MUNICIPAL CORPORATIONS.—RAILWAYS AND RAILWAY COMPANIES. ROAD COMPANIES.

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## COSTS.

*See* ELECTIONS, 3.—WITNESS, 1.

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## COURT HOUSE.

*Control and repair of—7 Wm. IV. ch. 18, 12 Vic., ch. 81, secs. 36, 41.*—The magistrates in quarter sessions have no power to order furniture for the court house, and the County Council are not liable for furniture so supplied. The fact that the court house was also used as a shire-hall for the sittings of the Council, and the furniture made use of by them, could make no difference. *Coombs v. The Municipal Council of the County of Middlesex*, 367.



## COVENANT.

1. *Action by Assignee—Evidence—Amendment.*—Plaintiff declared that defendant, by his deed, covenanted not to commit waste, not stating with whom the covenant was, nor who were the parties to the deed. *Held*, that the plaintiff could not show that he was suing as assignee of the reversion, but must prove a covenant with himself; and an amendment was refused at *nisi prius*. *Brennan v. Whitely*, 277.

2. *Construction of—Payment of interest.*—Covenant in a mortgage to pay £292 in eight equal annual instalments of £36 10s. each, "with interest on the principal sum remaining *due* at each payment." *Held*, that interest must be paid with each instalment on the whole principal money unpaid, though it might not be then payable,—not on the instalment only. *Hall et al. v. Brown*.

3. *Construction of—Running with the land—Pleading.*—Plaintiff conveyed to M. certain land, with the privilege of drawing off from the mill race on the adjoining land, which also belonged to the plaintiff, a certain quantity of water for purposes specified, leaving always sufficient to supply the mill on the plaintiff's land. And by the same indenture M. covenanted for himself, his heirs, executors, administrators and assigns, that he, his heirs, executors, administrators or assigns, would restrict themselves to the use of the water for the purposes mentioned, and would not take such water unless there should be enough without it to supply the plaintiff's mill. *Held*, that this was a covenant running with the land, on which the plaintiff might main-

n an action against M.'s assignees. *Quære*, whether the first count of the declaration, set out below, could be treated as in covenant only, or might be taken as a count in tort. *Warren v. Munro, et al*, 557.

## CRIMINAL LAW.

1. *Indictment.—Forgery.—Jurisdiction of Quarter Sessions.*—Defendant was convicted at the quarter sessions on an indictment charging that he feloniously did offer, dispose of, and put off a promissory note, purporting to be made by one F. for the sum of £4 10s., with intent to defraud, he, the said defendant, at the time he so uttered and published the said note as aforesaid, then and there well knowing the same to be forged. It appears that some boys had been amusing themselves with writing promissory notes and imitating person's signatures, and among them was one with F's name. The papers were put into the fire, but this note was carried up the chimney by the draft, and fell in the street, where it was picked up by defendant. A person who was with him at the time said that he thought that it was not genuine, and advised him to destroy it; but defendant kept it, and afterwards passed it off, telling the person who took it that it was good. *Held*, that upon these facts the defendant was guilty of a felonious uttering; but the conviction was quashed, for the indictment was defective in not stating expressly that the note was forged, or that defendant uttered it as true; and the case should not have been tried at the quarter sessions. *Regina v. Dunlop*, 118.

2. *Criminal Law—Illegal conviction.*

*tion for capital offence—Proceedings thereon.*—Where, after conviction for a capital offence the proceedings were discovered to have been illegal, there having been no associate judge sitting in court during the trial, on motion on behalf of the Crown (*the prisoner not moving in any way*), the indictment and conviction, with the prisoner, were brought up on *certiorari* and *habeas corpus*, and an order made setting aside all such proceedings, and remanding the prisoner to custody, *with a view to a new trial*. *Regina v. Sullivan*, 198.

### CROSSINGS.

*Duty of Railway Companies to make farm-crossings.*—See RAILWAYS AND RAILWAY COMPANIES, 5.

### CROSS REMAINDERS.

See WILL. 1.

### DAMAGES.

See CONTRACT, 2. — LIBEL — NEW TRIAL, 1, 4. — TROVER.

*Trespass—Damages after the issuing of the writ.*—In trespass to land, where the action was brought on the 7th of May. *Held*, that the plaintiff might recover to the extent of the ultimate injury resulting to the crop from the act complained of, as ascertained at the time of harvest. *Throop v. Fowler*, 365.

### DEATH.

See ARBITRATION AND AWARD, 2.

*Action by executors for death of testator—Interrogatories proposed by defendants.*—See "Interrogatories."

1. *Arbitration—Death of plaintiff*

*before judgment—Proceeding ex parte.*—Where a plaintiff, in whose favour an award is, dies after the award, but before judgment, the suit does not abate, but judgment may be entered under the 17 Car. II., ch. 8. *Proctor v. Farvis et al.*, 187.

2. *Death of plaintiff while rule nisi pending—Practice—C. L. P. A., Sec. 248—Retrospective effect of.*—A trial in ejectment was had in 1854, and a verdict rendered for the plaintiff. In the following term a rule nisi was obtained for a new trial, which, owing to the loss of some exhibits, was not argued until 1856, and was then discharged: in the meantime the plaintiff died, leaving a will by which he devised the land to certain persons in trust. The court, on application, allowed judgment to be entered *nunc pro tunc*, and a suggestion to be entered of the death, leaving it to be afterwards determined whether the C. L. P. A., sec. 248, would apply retrospectively. *Davy and Russell v. Cameron*, 172.

### DEDICATION.

See HIGHWAY.

### DEED.

See HUSBAND AND WIFE.—LEASE.

*By whom to be prepared on sale of Land.*—See VENDOR AND VENDEE, 2.

1. *Escrow—Evidence of delivery.*—Defendant executed a deed of bargain and sale in the usual form, purporting to convey to his son William Hubbs the land in question. It was stated in the attestation clause to have been signed, *sealed and delivered*, and the two subscribing witnesses

could not recollect any thing said about a future delivery at the time of execution, at which the grantee was not present. Defendant, however claimed that the deed was delivered only as an escrow, his purpose being to reserve the delivery until he should be sufficiently satisfied with the conduct of his son; and the reason given for making the conveyance at the time was, that being then a widower, and about to marry again, he desired to cut off any claim for dower. He proved that he had at the same time executed deeds to his other sons, which he had afterwards at different periods given to the grantees; and that before the execution of this deed, William had worked a fulling-mill upon this land on shares, under an agreement with his father, which he (William) swore had not been put an end to. On the other hand it was shewn that the grantee had voted on this land once, at an election at which his father was returning officer, and that he had qualified upon it as a municipal councillor: and further, that in a subsequent deed executed by defendant, of part of the same lots, the piece in question was reserved as "heretofore deeded to William Hubbs." It appeared too that the grantee had for more than twenty years lived upon this lot, paying nothing except under the agreement about the mill. The jury having found that the deed was absolutely delivered, *Held* that the evidence supported their verdict. *Young et al. v. Hubbs et al.*, 250.

2. *Conveyance—Description of land—Reference to survey—Estoppel.*—J. A., by deed, dated 22nd of January, 1840, conveyed to the plaintiff lots 134, 135, and 136, in the third concession of Sandwich, adding this

description, "which said lots were patented to the said James Askin, bearing date the 15th of March, 1836, and which was surveyed and laid off by John Alexander Wilkinson, D. P. S., on 21st of January, 1840." *Held*, that the plaintiff was not bound by such survey, but could claim the whole of lot 136 as laid out by government. *Mahony v. Campbell*, 396.

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### DELIVERY.

*Evidence of delivery of deed.*—See DEED 1.

*Evidence of delivery of goods to Railway Company.*—See RAILWAYS AND RAILWAY COMPANIES, 7.

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### DEMURRER TO EVIDENCE.

See RAILWAY AND RAILWAY COMPANIES, 7.

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### DESCRIPTION OF LAND.

*Reference to survey in deed.*—See DEED, 2.

*Uncertainty in agreement for sale.*—See VENDOR AND VENDEE, 1.

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### DEVISE.

See WILL.

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### DISCLAIMER.

See EJECTMENT, 3.

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### DISTRESS.

See PLEADINGS, 3.

*Goods seized off the premises—*



*Liability of landlord—Replevin.*]—Defendant gave a warrant to a bailiff to distrain for rent on premises occupied by the plaintiff as his tenant, but the bailiff seized plaintiff's property off the premises. This was done without defendant's knowledge, and there was no evidence of his having adopted the act. *Held*, that defendant was not liable, and that the plaintiff could not maintain replevin against him. *Ferrier v. Cole*, 561.

### DOWER.

*Demand and refusal—Evidence of readiness to assign—13 & 14 Vic., ch. 58, sec. 5.*]—DOWER.—*Plea, tout temps prist.* *Replication*, a demand and refusal. *Rejoinder*, denying the refusal. There was no suggestion that the husband died seised. The evidence shewed that the tenant had frequently offered the demandant her dower, and to leave it to two persons to stake out the land, but she declined, saying that she could not work the land and would rather have compensation, and no portion was in fact marked out. *Held*, that the issue must be found for the tenant. As the husband did in fact die seised, *Semble*, per *Burns, J.*, that that should have been suggested on the record, and the tenant would then have been entitled to damages from the suing out of the writ, and consequently to costs. *Ryckman v. Ryckman*, 266.

### EJECTMENT.

See DEATH, 2.—EVIDENCE, 4.—LEASE.

1. *Bond to allow grantor's wife to hold possession*]—The patentee conveyed the land in question to the

person through whom the plaintiff claimed, and it appeared that at the time of such conveyance a bond was taken to re-convey on payment of a certain sum, and to allow the wife of the patentee to have possession during her life whether the land should be re-conveyed or not. *Held*, that the plaintiff could not, in the face of this bond, dispossess the patentee during the life of his wife. *Arnold v. Buller and Smith*, 255.

2. *Tenant in common—Notice of title—C.L.P.A., sec. 242.*]—Where in ejectment defendant in his notice claimed the whole premises under a conveyance from A.B., he was not allowed at the trial to set up that he was tenant in common with the plaintiff, and insist upon proof of ouster. *McCallum v. Boswell*, 343.

3. *Writ served on defendant not in possession—Practice.*]—Plaintiff commenced an action of ejectment against the defendant, after he had quitted possession of the premises in question. Defendant entered an appearance, not limiting his defence, nor stating the nature of his own claim, but at the same time he served a notice on the plaintiff's attorney that he did not deny the plaintiff's title, and had given up possession before action brought. The plaintiff nevertheless took the record down to trial. *Held*—1. That the notice given with the appearance did not oblige the plaintiff to prove at the trial that the defendant was in possession when the writ issued. 2. That upon such notice the plaintiff could not have signed judgment. 3. That the bringing an action under the circumstances was unnecessary, but that the defendant should have applied to the court to set aside the writ, instead of appearing to



it; and both parties being wrong, the proceedings were set aside without costs. *Quære* per *Robinson, C. J.*, whether, if defendant appears, but omits to give notice of the nature of his title, the plaintiff may sign judgment as for want of an appearance. *Harper v. Lowndes*, 430.

4. *Former recovery.*—Where a plaintiff in ejectment recovers land of which he has been for twenty years dispossessed, and is put into possession by the sheriff, the defendant is not precluded from trying the right again, and relying in an action brought by him upon his title acquired by the twenty years' possession. *Moran v. Fessup*, 62.

## ELECTIONS.

1. *Right of appeal*—12 *Vic., ch. 81, sec. 152—Bribery.*—The judgment of the county court judge, in a contested election case, upon a question of fact depending on conflicting testimony, will not be overruled. The intention of the statute was not to allow this, but to provide an appeal upon any legal question on which the case may have turned. *Quære*, as to the effect of bribery at municipal elections. *Regina ex rel. McKeon v. Hogg*, 140.

2. Where the returning officer used the original collector's roll instead of a copy, as directed by the act, having first announced that he intended to do so, and no one having objected,—*Held*, that the election was valid. *Regina ex rel. Hall v. Grey et al.*, 257.

3. *Alteration of poll-book—Evidence—Costs.*—At the close of the poll the returning officer declared

the relator duly elected, but afterwards he received an affidavit from one M. that his vote had been entered by mistake for the relator, on which he altered this vote in the poll-book; and the numbers being then equal for the relator and defendant, he added his own casting vote as returning officer for defendant, and returned that he was duly elected. *Held* (confirming the decision of the county court judge), that the returning officer had no power to alter the poll-book after the close of the poll: that the defendant's election was illegal; and that the relator should be seated. *Held*, also, that the evidence of the defendant, and of the returning officer was properly rejected.—Where it was adjudged in the county court that the returning officer should pay the costs, and it appeared by affidavits filed on appeal that he was insolvent, and that in doing what was complained of he had acted at defendant's instance—*Held*, that this court might alter the judgment below, so as to make the defendant liable for costs as well as the returning officer. *Regina ex rel. Acheson v. Donoghue (Councillor) and Bennett (Returning Officer)* 454.

## ESCAPE.

*See* SHERIFF.

## ESCROW.

*See* DEED, 1.

## ESTATE.

*See* WILL, 1

ESTOPPEL.

See ASSIGNMENT, 2.—DEED, 2.—  
EVIDENCE, 3.—HIGHWAY.—RAIL-  
WAYS AND RAILWAY COMPANIES, 9.  
—TROVER.

1. *Trespass—Sheriff.*—Where in trespass against the sheriff for taking goods the jury gave the full value of all seized, although the plaintiff had expressly claimed only a portion, declaring that the rest were not his, a new trial was granted. *Roblin v. Moodie et al.*, 185.

2. *Landlord and Tenant—Pleading.*—Declaration, that the plaintiff let to defendant a certain tenement, to be used by him as a dwelling house, for certain rent, whereby it became his duty not to remove or despoil the same, yet defendant did remove the house, which thereby became wholly lost to the plaintiff; and for that defendant converted to his own use certain goods and chattels, to wit, a building and the materials of which it was composed. Plea, that the building was situate on defendant's land, and encumbered the same, wherefore defendant gave due notice to the plaintiff to remove it, and because it was not removed in a reasonable time defendant removed it, doing as little damage as possible. *Held*, on demurrer, plea bad; for defendant having accepted a lease of the house, which would carry with it the land on which it stood, was estopped from thus denying his landlord's title. *Renalds v. Offitt*, 221.

3. *Fraudulent assignment—Concurrence of plaintiff therein—Estoppel.*—Defendant went to England, leaving A., an agent on his farm, who purchased corn from the plaintiff for the purpose of feeding de-

fendant's cattle. Executions were issued against defendant; and A., to protect the cattle, made a bill of sale of them to the plaintiff as if to pay the sum due to him for costs, but gave at the same time an undertaking that he would pay pasturage for them at the usual rates; and when the bailiff came to seize, the plaintiff claimed the cattle as his own. He afterwards sued defendant for the pasturage. Defendant pleaded delivery and acceptance of the cattle in satisfaction, and the jury found in his favour. *Held*, that the verdict was right, for the plaintiff having concurred in the fraud by holding out the cattle as his own, could not afterwards claim for feeding them. *Bell v. Pell*, 594.

EVIDENCE.

See ARBITRATION AND AWARD, 3.—  
DEED, 1.—EJECTMENT, 2, 3.—EX-  
ECUTOR DE SON TORT, 1.—FLOUR,  
2.—JUSTICES OF THE PEACE.—  
—LIMITED PARTNERSHIP, 2.—  
MALICIOUS ARREST, 2.—NEGLI-  
GENCE.—PLEADING, 1, 2.—RAIL-  
WAYS AND RAILWAY COMPANIES,  
7.—WITNESS.

1. *Held*, that the secondary evidence of the bond, as stated below, was clearly admissible and sufficient.] —255.

2. *Sale of vessel—Agreement to pay premium—Admissibility of parol evidence after execution of deed.*—Plaintiff wrote to defendants, proposing to sell them a vessel for a certain sum, the proportion of premium on the insurance then effected, during the time the policy had yet to run, to be paid by the purchaser in cash. The proposition was accepted verbally, and a

regular assignment of the vessel executed to defendant, in which no mention of the insurance was made. *Held*, that the plaintiff might nevertheless recover the premium from defendants. *Mason v. Brunskill, et al.*, 300.

3. *Warranty—Admissibility of parol evidence—Estoppel—Failure of consideration.*—Assumpsit, on a note made by defendant jointly with A. and B. Plea, that the note was given for purchase money of a schooner sold by plaintiff to A. and B., defendant being their surety; that the plaintiff on such sale guaranteed the vessel to be sound, but she was not sound, but unsafe and rotten, as plaintiff well knew; and said A. and B. immediately after the sale discovered the unsoundness, returned the vessel to plaintiff, and repudiated the sale. At the trial the written instrument was produced, from which it appeared that the sale was to *defendant alone*, and no such guarantee as alleged was contained in it. It was proved that A. and B., after keeping the vessel a fortnight, tendered her back to the plaintiff, but she was refused, and they went on using her. *Held*, that verbal evidence of the warranty stated in the plea was not admissible. *Semble*, that the facts did not shew a total failure of consideration, and therefore formed no defence. *Semble*, also, that the defendant could not shew, in the face of the writing produced, that the sale was to A. and B., not to himself. *Henderson v. Cotter*, 345.

4. *Ejectment—Undertaking to admit title—Construction of.*—An action of ejectment, which had been tried twice, and in which defendant relied upon the Statute of Limitations, was put off when brought

down to trial a third time upon payment of costs, "also on the condition of the defendant admitting on any future trial of this cause the title of the lessor of the plaintiff to the premises mentioned in the declaration, and the right to recover *prima facie*, unless he shews a superior title to hers on the trial thereof, or any title or defence to defeat the same at law," &c. At the next trial the plaintiff refused to produce the patent, or admit the issuing or date of it, so that the defendant was unable to go into his defence under the statute. *Held*, that the plaintiff was entitled to take this course, for the effect of the order was to dispense with any proof or production of title on his part, not merely to oblige the defendant to admit such title when produced; and, as the defence under the circumstances was not one to be favoured, and the verdict not final, the court refused to interfere—*McLean J.*, dissenting. *Doe dem. Shepherd v. Bayley*, 460.

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## EXCESIVE LEVY.

*See* PLEADING, 4.

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## EXECUTION.

*See* ASSIGNMENT, 1, 2, 3.—EXECUTOR DE SON TORT.—FIXTURES.

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## EXECUTOR DE SON TORT.

1. *Sale of lands under fi. fa. against executor de son tort—Assignee of judgment—Purchase by him under execution thereon—Necessity for proof of judgment.*—Lands cannot be sold under an execution against an executor *de son tort*. Where in an



action against the defendant as executor, on a judgment recovered against the testator, the pleas were that the testator did not promise, and *ne unques* executor, and judgment was entered on the first issue only, taking no notice of the second. *Held*, that although defendant's pleading the first plea would entitle the plaintiff to succeed on the second, yet the issue should have been disposed of; and that the judgment, therefore, would not support an execution against the defendant as executor. *Held*, also, that the defendant in this case, who had purchased the judgment in the Court of Requests, at whose instance the action on it was brought, and who had purchased the land in question under an execution in that action, was bound to shew a judgment to warrant such execution. *McDade dem. O'Connor et al. v. Dafee*, 386.

2. *Held*, affirming the last case, that real estate cannot be sold in this province under an execution obtained against an executor *de son tort*. *Wrathwell v. Bates*, 391.

### EXECUTORS.

*Action by for death of testator.*]—See INTERROGATORIES.—NEW TRIAL, 4.

### FARM CROSSINGS.

See RAILWAYS AND RAILWAY COMPANIES, 5.

### FILING.

See ASSIGNMENT, 3, 4, 5.

### FIXTURES.

A building originally used as a store-house was converted into a

steam grist-mill. Afterwards the mill machinery was taken out, the boiler and engine being left to work various other machines, which were put in for the purpose of making sashes and blinds, such as planing machines, turning-lathe, &c. These were fastened to the floors and timbers of the building to steady them while in motion, each machine being independent, capable of being moved without material injury to the building or interfering with the engine, and of being worked by any other proper motive power. In the assignment, under which the plaintiff claimed, these machines were described as chattels, but the deed being void as to the personalty for want of registration, he contended that they were part of the inheritance, not subject to an execution against goods, and passed to him with the land and building in which they were, which were included in the assignment; but *Held*, that the machines were chattels, and seizable under a *fi. fa.* goods. *Carscallen v. Moodie (Sheriff) and Dafee (Deputy Sheriff)*, 304.

### FLOUR.

See CONTRACT, 2.

1. Where flour is guaranteed to inspect of a particular grade, such as "No. 1 superfine," it must inspect sweet of that grade. If it inspects as of the grade contracted for, but sour, the guarantee is broken. *Bain v. Gooderham et al.*, 33.

2. *Brand on barrels—Warranty—Evidence.*]—Where a person manufacturing flour marks it as of a particular quality, that amounts to a warranty of its being of such quality. *Held*, that in this case the



evidence of representations made by the seller at the time of sale were sufficient to warrant the jury in finding an express warranty. *Chisholm v. Proudfoot*, 203.

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## FOREIGN LAW.

*See* CONSIDERATION.

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## FORGERY.

*See* CRIMINAL LAW, 1.

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## FRAUD.

*See* ESTOPPEL, 3—NEW TRIAL, 2.—PLEADING, 1.

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## GENERAL ISSUE, BY STATUTE.

*What defences admissible under.*—

*See* ACTION.

*Not allowable in actions for non-feasance.*—*See* PLEADING, 5.—RAILWAYS AND RAILWAY COMPANIES, 5.

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## GRAND TRUNK TELEGRAPH COMPANY.

*See* BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.

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## GUARANTEE.

*See* FLOUR.

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## HIGHWAY.

*See* CONVICTION.—RAILWAYS AND RAILWAY COMPANIES, 1, 2.—ROAD COMPANIES.—STATUTE LABOUR.

*Lanz — Dedication.*—Where a person has sold lots according to a plan on which a lane is laid out in their rear, he cannot afterwards shut

up such lane; and the fact that he had previously conveyed portions of the land comprised in the lane, would only affect so much as he had thus precluded himself from giving up to the public, and would not entitle him to close up the whole *Regina v. Boulton*, 272.

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## HUSBAND AND WIFE.

A deed executed by the husband alone, purporting to pass the fee in his wife's land, will convey his own interest in it. *Allan v. Levisconte*, 9.

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## INDIANS.

*Sale of land by Indians*—13 & 14 Vic., ch. 74.]—The 13 & 14 Vic., ch. 74, which prohibits the sale of land by Indians, applies only to lands reserved for their occupation, and of which the title is still in the Crown, not to lands to which any individual Indian has acquired a title. *Totten v. Watson*, 392.

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## INDICTMENT.

*See* ACTION.—RAILWAYS AND RAILWAY COMPANIES, 1.

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## INFANT.

*See* PARENT AND CHILD.

*Custody of Infant—Marriage—Imperial act 26 Geo. II., ch. 33.*—Where it appeared doubtful on the affidavits whether a minor, about whose custody there was a dispute, was under or over sixteen years of age, and she had been married by license with her own consent, the court refused to restore her to the custody of the applicant, with whom she had been living as an

adopted child for some time previous to her marriage, but who was neither her parent nor guardian. *Semble*, that the English Marriage Act, 26 Geo. II., ch. 33, is not in force in this country. *Regina v. Bell*, 287.

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### INITIALS.

*In affidavit.*]—See CHATTEL MORTGAGE.

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### INQUEST.

See CORONER.

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### INSOLVENT.

1. 7 Vic., ch. 10, 19 & 20 Vic., ch. 93.]—Defendant was a trader, within the 7 Vic., ch. 10, but first became so after the expiration of that act, and became insolvent before the passing of 19 & 20 Vic., ch. 93. *Held*, that he was clearly entitled to take the benefit of the latter act. *Boulton v. Nourse*, 555.

2. *Bond to the limits—Interim order for protection—Pleading*—8 Vic., ch. 48.]—Action on bond to the limits against F., and his sureties. *Sixth plea*, that by an order made by the court for the relief of insolvent debtors, according to the statutes 8 Vic., ch. 48, and 19 & 20 Vic., ch. 93, the defendant F. was duly discharged from the cause of action for which the arrest took place. *Seventh plea*, that before the said F. departed from the limits, and after his arrest and bail given, by an order of the said court, according to the statutes, an interim order for protection was given to him, which was in full force at the time of his departure as alleged. *Eighth plea*, that before the commencement of

this suit a petition for protection of said F. was presented to W. S., judge of the county court, and filed in the insolvent court, and thereupon a final order for protection and distribution was made by W. S., judge as aforesaid, duly authorised; and that the debt for which the attachment issued, on which F. was arrested, was contracted before the filing of said petition. *Held*, on demurrer, pleas bad. *Meyers v. Francis, O'Reilly, and Fudd*, 664.

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### INSURANCE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.—EVIDENCE, 2.

1. *Insurance—Condition—Production of vouchers.*]—One condition of a policy was that the assured should, within a month after the loss, deliver in as particular an account thereof as the nature of the case would admit of, and make proof of the same by production of his books of account and other proper vouchers, and give such further explanation thereof as should be necessary, and that until this was done the loss should not be payable. The company had required certain invoices, which the plaintiffs refused to produce, though it was in their power to do so: but the jury, being satisfied on other evidence that the loss had been actually sustained, found in favour of the plaintiffs. *Held*, that not having complied with the condition in the policy, the plaintiffs could not recover, and a new trial was granted. *Cinq Mars et al. v. The Equitable Insurance Company*, 143.

2. *Insurance—Production of Vouchers.*]—*Held*, referring to the last case, that the evidence set out here

being substantially the same as in that case, fully supported a verdict for defendants on the plea setting up that vouchers and explanations, which the plaintiffs could have given had not been furnished as required, which under the policy was a bar to the action. *CinqMars et al. v. The Equitable Insurance Company*, 246.

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### INTEREST.

See COVENANT, 2.

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### INTERROGATORIES.

Action by executors for death of testator, caused by defendants' negligence — Measure of damages — Interrogatories proposed by defendants to plaintiffs after issue joined, as bearing upon the question of damages—How far allowable and when they should be proposed—Form and nature of such interrogatories—When and how objections should be taken. *Ferrie et al., Ex-executrix and executor of Adam Ferrie, the younger, v. The Great Western Railway Company*, 513.

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### JUDGMENT.

*Necessity for proof of.*—See EXECUTOR DE SON TORT, 1.

*Set off of judgment.*—See SET OFF.

*Pro confesso.*—See WITNESS, 1.

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### JUSTICES OF THE PEACE.

See APPEAL.—CONVICTION.

*Trespass against a magistrate—Proof of quashing conviction—Evidence of plaintiff's guilt of the charge—Effect of—Provisions of statute overlooked at the trial—16 Vic., ch. 180, sec. 12—Notice of action—Name and residence of attorney not indorsed.*—Trespass against a magistrate for seizing and selling

plaintiff's goods. To prove the quashing of the conviction a rule of court was put in, in which the offence, the name of the complainant, and of the magistrate, were mentioned. *Held*, sufficient, without further identifying the conviction mentioned in the rule with that on which the warrant issued, for the court would not presume another conviction similar in all these respects. At the trial evidence was given to shew that the plaintiff had been guilty of the offence charged, but such evidence was offered and received only in mitigation of damages; the provisions of the 16 Vic., ch. 180, sec. 12, which in such a case limits the damages to 2d. and deprives the plaintiff of costs, were overlooked, and the plaintiff obtained a verdict for full damages. *Held*, that there must be a new trial, without costs. *Held*, also, that the provision is not confined to actions in which the justices had jurisdiction. The name and place of residence of the plaintiff's attorney were not *indorsed* on the notice of action, as directed by the statute, but were added inside at the foot of the notice. *Held* sufficient; and that, at all events, such objection not having been taken at the trial could not be made in banc. *Bross v. Huber*, 625.

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### LANDLORD AND TENANT.

See ACTION.—CONTRACT, 3.—DISTRESS. — ESTOPPEL, 2. — ROAD COMPANIES, 2.—USE AND OCCUPATION.

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### LANDS.

*Sale of under execution against executor de son tort.*—See EXECUTOR DE SON TORT.



LEASE.

See LANDLORD AND TENANT.

*Writing—Construction of—Lease or release—Ejectment.*—A. died, leaving the plaintiff, his widow, and defendant, his heir at law. The plaintiff being in possession of part of the property, the defendant executed the following instrument under seal: "Know ye, all men, that I, John G. Hall, do bind myself, my heirs, executors and assigns, in the sum of £300 to let my mother, Leah Hall, retain quiet and peaceable possession of the lot of land now in her possession, the same being 50 acres, more or less, for the term of her natural life." *Held*, a lease for life, and that the plaintiff might maintain ejectment. *Semble*, per *Burns, J.*, that the writing might also be supported as a release. *Hall v. Hall*, 637.

LETTERS.

See CONTRACT, 1.

LIBEL.

*Excessive damages—New trial refused.*—In an action for libel, the imputations being of a very slanderous character, and a plea of justification pleaded which was not attempted to be proved, the court refused a new trial for excessive damages, though they would have been much better satisfied with a smaller verdict. *Gfroerer v. Hoffmann*, 441.

LIEN.

See CARRIERS.

LIMITED PARTNERSHIP.

1. *Limited partnership*—12 *Vic.*, ch. 75, sec. 14.]—Where a special partner of a limited partnership has

once rendered himself liable as a general partner, under sec. 14, by interfering in the business, he continues so liable, and is not relieved after he has ceased to intermeddle. *Hutchison v. Bowes et al.*, 156.

2. *Interference by special partner—Evidence*—12 *Vic.*, ch. 75.]—Where defendants are charged as general partners, having become so liable by intermeddling in a firm of which they were originally special partners, it is not necessary for the plaintiff to shew that the limited partnership was regularly formed under the statute. *Held*, that in this case the evidence of interference was sufficient to establish defendants' liability. *Davis v. Bowes et al.*, 280.

LIQUORS.

See MUNICIPAL CORPORATIONS, 1.

LOAN.

See MONEY LENT.

MAGISTRATE.

See JUSTICES OF THE PEACE.

MALICIOUS ARREST.

1. *Arrest for claim secured by mortgage—Action therefor—Effect of the mortgage.*—*Blakely v. Patterson et al.*, 180.

2. *Evidence of reasonable and probable cause.*—*Held*, that under the evidence stated below, the plaintiff clearly failed to shew want of reasonable and probable cause, and that a nonsuit should be entered. *Wanless v. Matheson and Blair*, 278.

MANDAMUS.

A mandamus will lie to compel a witness to prove the execution of a deed and memorial for registry. *Regina v. O'Meara*, 201.



## MARRIAGE.

See INFANT.

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## MARRIED WOMAN.

See HUSBAND AND WIFE.

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## MEASURE OF DAMAGES.

See CONTRACT, 2.—DAMAGES—NEW TRIAL, 4.

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## MONEY HAD AND RECEIVED

See VENDOR AND VENDEE, 1.

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## MONEY LENT.

*Loan for special purposes—Breach of agreement—Money lent.*—Plaintiff lent to defendant £35, upon a verbal agreement that he should build with it a house upon a lot belonging to him, in which the plaintiff and her mother should live during the mother's life. The house was built, and they went into possession on this understanding, but afterwards it was verbally agreed that defendant should give the plaintiff a lease during the life of the mother. He, however, mortgaged the premises to a third party, and having had some dispute with the plaintiff, brought ejectment to turn her out. *Held*, that the plaintiff might recover back the £35 as money lent. *Harrington v. Harrington*, 241.

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## MORTGAGE.

See ASSIGNMENT, 1.—COVENANT, 2.

## MUNICIPAL CORPORATIONS.

See COURT HOUSE.—RAILWAYS AND RAILWAY COMPANIES, 1, 2—STATUTE LABOUR.

1. *By-law—Shop licenses to sell liquors—Power of Municipalities—16 Vic., ch. 184, sec. 3, sub-sec. 2.*—A by-law directing the clerk of the municipality to grant licenses to sell spirituous liquors for the year to two parties named, and that no such licenses should be issued to any other persons—*Held*, good. Where the operation of a by-law is spent, it will not be quashed. *Terry and The Municipality of the Township of Haldimand*, 380.

2. *Municipal corporations—Right to sue on contracts not within their charter—New trial refused.*—Defendant gave his bond to a municipality to put up a mill on his own land, and being sued upon it pleaded performance, which at the trial he failed to prove, and a verdict was rendered against him for £12 10s. The court, under the circumstances, refused to interfere. *Sem-ble*, however, that if the objection had been taken in time, no action could be maintained by the municipality on such a bond, without shewing on the record something to warrant them in taking it, the contract being apparently one wholly without the scope of their charter. *The Municipality of the Township of Kinloss v. Stauffer*, 414.

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## MUNICIPAL ELECTIONS.

See ELECTIONS.

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## NAVIGABLE RIVER.

*Obstruction of—Right of action by individual.*—See ACTION.

## NAVIGATION.

See SHIPPING.

## NEGLIGENCE.

See RAILWAY COMPANIES, 6, 7.—  
ROAD COMPANIES.

*Sleigh upsetting.—Runaway—Negligence.*] — Action for negligence in driving a sleigh and horses against the plaintiff. It appeared that the driver, to get better sleighing, had turned off the road to follow a track along the ditch at one side; and that in coming up again the sleigh upset, and the horses running away overtook and ran against the plaintiff. The passengers in the sleigh which was upset acquitted the driver of any negligence; but another witness, who was near at the time, said that he thought, if more care had been used in coming up, the accident would not have happened. The jury having found for the plaintiff, a new trial was granted. *Robinson v. Bletcher et al.*, 159.

## NEW TRIAL.

See AMENDMENT.—CRIMINAL LAW,  
2.—ESTOPPEL, 1, 3,—INSURANCE,  
1.—JUSTICES OF THE PEACE.—  
LIBEL.—MUNICIPAL CORPORATIONS,  
2.—NEGLIGENCE.—RAILWAYS AND RAILWAY COMPANIES,  
1.—TROVER.

1. *Action on contract—Smallness of damages—New trial refused.*] T., being the plaintiffs' engineer, made plans and estimates for their road, but when the tenders came in, the lowest being £1,500 above his estimate, he offered to do the work himself for what he had

valued it at. The plaintiffs accepted the offer, and he, with the two other defendants — they being in fact his sureties, though not so styled in the writing—entered into an agreement under seal with the plaintiffs accordingly. T. began the work, and did what at the contract price would come to about £2,690, allowing certain deductions, which the plaintiffs claimed to make for imperfect work. He then abandoned it and left the province, having received from the plaintiffs about £2,925. The plaintiffs contracted with others to finish the road, at about £980 more than they would have had to pay T., and brought an action against the three defendants for breach of the agreement, claiming to recover this £980. The jury gave only £50, and the court refused to grant a new trial on account of the smallness of damages. *The Union Road Company v. Talbot et al.*, 106.

2. *Fraud—Concurrence of defendant—New trial refused—Appeal.*] —Charles and Peter CinqMars, carrying on business at Belleville, being indebted to B. & Co. for goods executed to them a confession of judgment. Other creditors pressing, an execution was issued on this confession, and an arrangement made that the goods should be sold by the sheriff: that a brother of C. & P. CinqMars, a minor, should buy them in, and the execution debtors receive credit for the proceeds, and that the business should be carried on by him and C. CinqMars, the goods remaining in his name as ostensible owner. Peter CinqMars lived in Montreal. Afterwards the plaintiff packed up the goods, and being about to send them to his brother in Montreal, they were seized and sold by B.

& Co., as the property of C. Cinq-Mars. For this the plaintiff sued; and the jury having twice found in his favour—*Held*, that although it seemed clear that the plaintiff had never in fact purchased or paid for the goods, but had been set up as a purchaser merely to protect them from other creditors, yet as B. & Co. had concurred in holding him out in a false character, the court should not interfere. An appeal will not lie in such a case. See note, page 610. *D'Estè Cinq Mars v. Moodie, Sheriff*, 601.

3. In an action against the maker and indorser of a promissory note a new trial was granted as to one defendant, leaving the verdict to stand as to the other. *Hanscome v. Cotton*, 42.

4. 10 & 11 Vic., ch. 6—*Measure of damages*.]—In actions under 10 & 11 Vic., ch. 6, brought for the death of a person killed by accident, the court will interfere if the damages assessed are clearly excessive; but *Held*, that under the circumstances of this case £3,000 was not an exorbitant compensation for the widow and three children of the deceased. *Semble*, that the mother in this case could have no claim. *Secord v. The Great Western Railway Company*, 631.

### NONSUIT.

*Right to move against*.]—See PRACTICE.

### NOT GUILTY, BY STATUTE.

See GENERAL ISSUE, BY STATUTE.

### NOTICE OF ACTION.

See JUSTICES OF THE PEACE.

### NUISANCE.

See RAILWAYS AND RAILWAY COMPANIES, 1.

### NUL TIED RECORD.

See BAIL, 1.

### PARENT AND CHILD.

*Contract of infant for service with parents*.]—*Quære*, whether if an infant hire himself for wages to his parent, the contract is binding on the latter. *Perlet v. Perlet*, 165.

### PARTNERSHIP.

See LIMITED PARTNERSHIP.—WITNESS, 2

### PLEADING.

See ACTION.—ARBITRATION AND AWARD, 3.—BAIL, 1, 3.—DOWER. ESTOPPEL, 2.—INSOLVENT, 2.—RAILWAYS AND RAILWAY COMPANIES, 1.—RELEASE—SCHOOLS, 2.—SHIPPING, 2.—VENDOR AND VENDEE, 1.

1. Under a plea denying plaintiff's property, when the goods were not taken out of his possession, the sheriff may shew that an assignment under which the plaintiff claims is fraudulent; but he must prove the execution under which he seized, unless his warrant is produced reciting it. *Robliu v. Moodie et al.*, 185.

2. When the declaration is framed in case, charging a false and deceitful warranty, knowing it to be untrue, the plaintiff may recover on proving the warranty only, without



the *scienter*. *Chisholm v. Proudfoot*, 203.

3. *Distress—Denial of sum distrained for.*]—*Replevin—Avowry* for distress for rent under a demise for years at £18 a year, averring £18 to have been due. *Plea*, that defendant did not take the goods as and for a distress *for the sum of £18*. *Held*, on demurrer, plea good in substance. *Sheeran v. O'Connor et al.*, 418.

4. *Excessive levy—Declaration.*]—*Held*, that the second count of the declaration, set out below, charging defendants, as attorneys, with having entered judgments and levied on the plaintiff's goods for the full amount of a claim, without deducting a payment made; and the third count charging a levy on other goods after enough had been seized, were both good in substance. *Reid v. Ball et al.*, 568.

5. *Road companies—16 Vic., ch. 190, sec. 53—Pleading general issue "by statute."*]—Where a road company was sued for not keeping their road in repair—*Held*, that they could not, under 16 Vic., ch. 190, sec. 53, plead the general issue and give any special defence in evidence, the injury complained of not being any thing done by them in pursuance of the act, but a duty omitted. *March v. The Port Dover and Otterville Road Company*, 138.

#### POSSESSION.

*Actual and continued change of, so as to dispense with filing under 12 Vic., ch. 74, and 13 & 14 Vic., ch. 62.*]—See ASSIGNMENT, 3, 4, 5.

See EJECTMENT 1, 4.—VENDOR AND VENDEE, 1.

#### PRACTICE.

See AMENDMENT.—APPEAL.—ARBITRATION AND AWARD, 2.—BAIL, 1, 2.—CRIMINAL LAW, 2.—DEATH.—EJECTMENT 2, 3.—INTERROGATORIES.—NEW TRIAL.—MUNICIPAL CORPORATIONS, 1.—SET OFF.—WITNESS, 1.

*Semble*, that the plaintiff in this case, having accepted a nonsuit while the judge was charging the jury adversely, was not entitled to move against it. *Fraser v. North Oxford, &c., Road Co.*, 291.

#### PRINCIPAL AND AGENT.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.

#### PURCHASE MONEY.

*Right to recover back on sale of land.*]—See VENDOR AND VENDEE, 1.

#### QUARTER SESSIONS.

See APPEAL—CRIMINAL LAW, 1.

#### RAILWAYS AND RAILWAY COMPANIES.

See ACTION.

1. *Obstruction of highway—Leave of municipality—Form of indictment—New trial.*]—The Grand Trunk Railway Company was indicted for nuisance, in obstructing a street in the town of Guelph, by occupying it with their road. It appeared that the municipality had passed a by-law allowing them to occupy the street with their railway, and ordering that for that purpose a portion of it should be closed altogether as



a highway. *Held*, that such by-law was not within the 12 Vic., ch. 81, sec. 192, and therefore that the notice there directed to be given was not required. *Held*, also, that the consent of the municipality might have been given, under 14 & 15 Vic., ch. 51, sec. 12, by resolution as well as by by-law. *Semble*, that the indictment should have been for carrying the railway along the street *without leave of the municipality*. *Quære*, whether it is proper to grant a new trial, where an individual or a corporation has been once acquitted on an indictment, even in cases of misdemeanor. *Regina v. The Grand Trunk Railway Company of Canada*, 121.

2. *By-law authorising railway to occupy streets*—14 & 15 Vic., ch. 51, sec. 12—12 Vic., ch. 81, sec. 192.]—The town council of Guelph passed a by-law, enacting that from the passing thereof the Grand Trunk Railway Company might carry their railway through the streets of the town, pursuant to the plan annexed: that a part of Kent street as shewn in said plan should be thenceforth stopped up as a highway, and might be appropriated by the company: that another street named should be diverted as so shewn; and that the by-law should be in force only on certain conditions mentioned in it. *Held*, that such by-law was valid under the 14 & 15 Vic., ch. 51, sec. 12, without the formalities required by 12 Vic., ch. 81, sec. 192; and that the leave given by it might equally have been given by resolution. *Held*, also, that if notice had been necessary the want of it should have been objected to without delay, not after the work authorised by the by-law had been completed.

*In re Day and the Town Council of Guelph*, 126.

3. *Railway—Assessment of.*]—Under the 16th Vic., ch. 182, sec. 21, only the land occupied by a railway is subject to assessment, not the superstructure. The decision of the county court judge upon such a point is not final. *Great Western Railway Company v. Rouse*, 168.

4. 14 & 15 Vic., ch. 51, sec. 11, sub sec. 16—*Arbitration—Notice of desistment.*]—Under the 14 & 15 Vic., ch. 51, sec. 11, sub-sec. 16, a notice for lands may be desisted from, and new notice given for the same lands, even after the arbitrators named in the first notice have met, and are engaged in the arbitration; and an award made by them after such notice of desistment is void. *Quære*, whether the arbitration under the second notice can also be desisted from, or whether the power extends only to the arbitrators first appointed. *Per McLean, J.*—The award made by the first arbitrators was also bad in this case, for under sub-sec. 15, an award cannot be made by two arbitrators, when the third refuses to act. *Grimshawe v. The Grand Trunk Railway Company of Canada*, 224.

5. 14 & 15 Vic., ch. 51, secs. 13, 20—*Farm crossings—Right to plead not guilty, "by statute."*]—The Grand Trunk Railway passed through the plaintiff's farm, and where it intersected a lane running from the front to rear of the farm, a cutting was rendered necessary. The plaintiff insisted on having a farm-crossing made in continuation of this lane, *and by means of a raised bridge*. The defendants offered to make it at the place required, but not by a

raised bridge; and they were proceeding to cut through the plaintiff's land on either side, to make an approach to the railway, so as to cross upon a level, when the plaintiff interfered, and prevented them from going on with the cutting. They then desisted, and did nothing more. The plaintiff sued them for not making a convenient crossing, and recovered £12 10s. *Held*, upon the authority of a previous decision, between the same parties, in the Common Pleas, that the action was maintainable, and the verdict must stand, for defendants should have gone on and completed the crossing, at least on their own land. *Semble*, that in such an action, being for a nonfeasance, the defendants could not plead the general issue, by statute, and give special matter in evidence. *Reist v. The Grand Trunk Railway Company of Canada*, 355.

6. *Injury to cattle wrongfully on railway—Liability therefor.*—Where cattle have wrongfully got upon a railway through the negligence of the owner, the company are still obliged to use ordinary care to avoid a collision; and in this case, where horses had escaped upon the track through a gate at a farm-crossing, which the owner had left open, but although they were seen by the engineer the speed was not slackened, and no precaution taken except sounding the whistle, the company were held liable. *Campbell v. The Great Western Railway Company*, 498.

7. *Action for negligence in conveying a horse—Proof of delivery to defendants—Demurrer to evidence.*—Case, against a railway company, for negligence in putting upon one of

their carriages a mare, which it was alleged had been delivered to, and received by them from the plaintiff, to be safely loaded and unloaded and conveyed to A. *Plea*, denying the delivery to and receipt by defendants, and issue thereon. A witness for the plaintiff swore that he took the mare to the station, where a man assisted him to put her into a car, in doing which the accident happened, and the mare was then taken on the train to A. *Held*, that the proof was insufficient to sustain the issue, and that on demurrer to the evidence, judgment in the county court was properly given for the defendants. *Griffin v. The Great Western Railway Company*, 507.

8. *Trespass—Liability.*—J. & Co. had contracted with the Grand Trunk Railway Company to obtain the land required by them, and to construct their road; the line was laid out so as to cross the Bath macadamised road several times which being considered dangerous the contractors agreed to make a new line for the road company, and in doing so they encroached upon the plaintiff's land. *Held*, that the railway company were not liable. *Purdy v. The Grand Trunk Railway Company*, 571.

9. *Right of tenant for life to compensation—Action brought too late—Arbitration—Estoppel.*—The Grand Trunk Railway passed through certain land, of which C. was owner and the plaintiff a tenant for years. In 1853 an arbitration was held to determine the sum to be paid to C., and the plaintiff being appointed arbitrator on his behalf, concurred in making an award, saying nothing then of any claim on his own part; but in 1855, more than six months after the company had taken pos-

session of the land, he brought trespass against them. *Held*, that the action would not lie, for *first*, if maintainable, it was brought too late; and, *secondly*, his remedy, if any, was by arbitration. *Quære*, whether the arbitration clauses of 14 & 15 Vic., ch. 51, extend to tenants for years. *Semble*, that the plaintiff, by his conduct, had estopped himself from making any claim against the company. *Detlor v. The Grand Trunk Railway Company*, 595.

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## RECOGNIZANCE OF BAIL.

*See* BAIL.

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## REGISTRATION.

*Of conveyances of goods and chattels]*

—*See* ASSIGNMENT, 3, 4, 5.

*Mandamus to compel witness to prove deed.*—*See* MANDAMUS.

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## RELEASE.

*See* LEASE.

*Bond to convey vessel*—*Special pleas*—*Release not alleged to be by deed*—*Pleading.*—Declaration on a bond, reciting an agreement to sell a vessel to the plaintiffs for a certain sum, payable by instalments, for which notes were to be given, and conditioned to convey said vessel within a specified time, and for quiet enjoyment. Breaches—Refusal to convey, and eviction of the plaintiffs by one G., alleging as special damage payment of costs in a replevin suit brought by G. *Second plea*, to the first breach, that at the execution of

the bond the boat, as the plaintiffs knew, was mortgaged to one C., to secure the same sums for which the notes were given, and payable at the same times; and thereupon, in consideration that the obligors would deliver the notes to C., in order that when paid by the plaintiffs the proceeds should be applied on the mortgage; and in consideration that the plaintiffs would forbear to require the conveyance, C. agreed with the plaintiffs, with the consent of the obligors, to hold said mortgage only as a security for and until payment of said notes, and on payment to release the said boat to the plaintiffs: that the obligors then, at the plaintiff's request, and in pursuance of said agreement, transferred the notes to C., and the plaintiffs thereupon discharged the obligors from procuring the conveyance. *Third plea*, to the second breach, that after said agreement, and transfer of the notes, C. transferred all his interest in the notes and mortgage to said G.; that one of the notes being unpaid, G. brought the action of replevin, and thus obtained possession, claiming under C. *Held*, on demurrer, both pleas bad. *Corby et al. v. Paterson et al., Executors*, 575.

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## RENT.

*See* PLEADING, 3.

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## REPLEVIN.

*See* DISTRESS—PLEADING, 3.

## RESIDUARY DEVISE.

*See* WILL., 2.



## REVERSION.

See WILL, 2.

## REVERSIONER.

Right of action by.]—See ACTION.

## RIVER ROUGE.

Found to be a navigable river.]—  
See ACTION.

## ROAD COMPANIES.

See PLEADING, 5.—RAILWAYS AND  
RAILWAY COMPANIES, 8.

1. *Unfinished bridge.*]—A road company are not liable for accidents occasioned by the use of a bridge upon their road while it is in an unfinished state, and the road not completed. *Fraser v. North Oxford and West Zorra Plank Road Company*, 291.

2. *Impediments caused by snow-storms*—Action for by lessee of toll-gate—16 Vic., ch. 190, secs. 48, 69.]—Road companies under 16 Vic., ch. 190, are not liable to the lessee of a toll-gate for allowing the road to become blocked up by snow. *Stewart v. The Woodstock and Huron Plank and Gravel Road Company*, 427.

## SALE.

See VENDOR AND VENDEE.

## SCHOOLS.

1. *School trustees—Costs of defence—Rate—Separate schools.*]—A rate may be levied to reimburse school trustees for the costs of defending a groundless action brought against them. Where such charge was incurred before the establishment of a

separate Roman Catholic school: *Held*, that the supporters of that school were not exempt from the rate. *In re Tiernan and The Municipality of Nepean*, 87.

2. *School trustees—Award as to teacher's salary, &c.*—13 & 14 Vic., ch. 48, secs. 12, 17—*Personal liability of trustees—Second arbitration on non-payment of first award—Finality of award—Justification—Pleading.*]—*Replevin.*—*Plea*, by two of the defendants, B. & H., that the plaintiff, and W. K. and J. M., were school trustees of a certain school section, and had agreed to engage one Naylor as school teacher, but differences having arisen as to salary, &c., an arbitration was had under the statutes in that behalf, and the defendants, B. and H., two of the arbitrators, made an award, as follows:—that the said trustees and teacher had on a former occasion submitted their disputes to arbitration, when it was awarded that the said teacher should be paid £50 for his arrears of salary up to the time of his dismissal, and £3 5s. 9d. which by virtue of the statute had accrued due since the said dismissal, and before the award, by reason of the non-payment of said £50, together with £6 15s. the costs of said award;—that the defendants B. & H. as such arbitrators, further awarded that the said award was binding: that the moneys mentioned in it were still unpaid; that under the statutes, by reason of the non-payment of said arrears, the said teacher was entitled to his salary since the said award, amounting to £37 5s. 4½d., which the said arbitrators B. & H. awarded to be paid to said teacher, together with the costs of their arbitration: that because the trustees refused to perform such award, said B. & H., by



virtue of the statute, issued their warrant to defendant D. to collect such moneys, under which the property in question was seized. *Second plea*, by defendants B. and H., that the grievances charged in the declaration related wholly and solely to judicial acts done by them in good faith, and within their jurisdiction, and in their judicial capacity of arbitrators duly appointed to determine the differences pending between the said trustees and teacher. Defendant Dixon also pleaded, in a third plea, that the grievances with which he was charged related entirely to acts done by him under the statute, while acting in good faith, and within his jurisdiction, as the person named in the warrant, stating it to have been issued by the other two defendants as arbitrators, &c. The award when produced was as follows: 1st. That the arbitrators having received indisputable evidence of the former award, and of its recognition by the parties, agreed to adopt the same. 2nd. That as the trustees had failed to perform the award, and as by the statute 13 & 14 Vic., ch. 48, sec. 17, the teacher is entitled to his salary at the rate agreed on till fully paid, the said teacher was entitled to his salary from the date of such award to the present time, with costs of the arbitration, making altogether £95 12s. 3½d.; and further, that he was entitled to such salary for all time to come, until he should be paid in full. The first award was also proved, made in August, 1856, and was to the effect that there was due to the teacher from the trustees £50, for which they were individually liable. There had been a warrant issued some months before, by the arbitrators who made the

first award, and the goods of one of the trustees had been seized under it, and were replevied; and that action was pending for trial at the same assizes as this. The sum awarded by the first arbitration remaining unpaid, the teacher named an arbitrator and gave notice to the trustees, claiming for his salary since the date of the first award; but they, acting under legal advice, did nothing, and the second arbitration took place without their concurrence. On the second award the defendants B. and H. issued their warrant to D. to make the whole sum awarded (which included the sum due under the first award) by seizure and sale of the goods and chattels of said trustees. The teacher had been engaged by the trustees in March, 1856, at a certain salary, by verbal agreement only, and the evidence was contradictory as to the grounds of his dismissal. *Held* 1. That as the award of the defendants B. and H. proved differed materially from their award as set out in the first plea, such plea was not supported. 2. That the averment of an agreement with the teacher could be supported only by a written agreement. 3. That as by the 13 & 14 Vic., ch. 48, sec. 12, sub-sec. 16, the trustees can only be personally liable when they have wilfully neglected or refused to exercise their corporate powers, such neglect or refusal should have been alleged and shewn in the award, to warrant its direction to levy on the trustees personally. *Semie*, also, that the evidence shewed no sufficient ground for such liability. *Quere*, per *Burns, J.*, whether the arbitrators have authority to determine the question of personal liability on the part of the trustees. 4. That the non-payment of the first award was not a non-payment of the

teacher's salary under his agreement, so as to entitle him to such salary after the award; nor was it a matter in difference, within the meaning of the act, which could authorise a second reference. 5. That defendants were not precluded from raising these objections by the provision in the statute that such award shall be final. 6. That the second plea was insufficient on demurrer, for not stating any thing which could authorise an award against the trustees as personally liable. 7. That the third plea, by the bailiff, was bad for the same reason. 8. That if the award had been good as to the salary since the first award, yet the including in it the sum given by such award, and for which a levy had been already made, would make the whole award bad. *Kennedy v. Burness et al.*, 473.

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### SEAL.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.

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### SECONDARY EVIDENCE.

See EVIDENCE, 1.

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### SET-OFF.

*Bankruptcy—Set-off—Judgments.*]  
—Defendant, in September, 1848, recovered judgment against the plaintiff for a large debt, on which he afterwards took out a commission of bankruptcy, and proved for his claim. Plaintiff afterwards obtained a verdict and judgment against defendant, for £50, on which he issued execution. No certificate had been grant-

ed under the commission, and nothing done beyond the appointment of an assignee. *Held*, that the defendant could not set off his claim, for which he had proved under the commission, against the plaintiff's judgment. *Merrill v. Beaty*, 446.

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### SHERIFF.

See ASSIGNMENT, 2.—ESTOPPEL, 1.  
—PLEADING, 1.

*Quere*, whether the want of authority in the commissioner taking the affidavit of debt can be set up by the sheriff as a defence to an action for escape. *Glick v. Davidson*, 591.

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### SHIPPING.

See CARRIERS—EVIDENCE, 2. 3.

1. *Certificate of ownership—Addition of owners—Place of registration—Legal ownership.*—A certificate of ownership of a vessel under 8 Vic, ch. 5, sec. 2, is not invalid because the additions of the owners are omitted, the statute on that point being directory only. *Held*, that under sec. 4 the owners, living at Bath, might properly register the vessel at Kingston. *Held*, also, that under the various transfers set out below the plaintiff was the legal owner of the vessel. *Gildersleeve v. Corby et al.*, 150.

2. *Ship-owners—Common carriers—Accidental fire*—26 Geo. III., ch. 86.]—The owners of ships which are engaged as general traders are liable as common carriers, equally with those whose vessels only carry goods between certain named places. Defendants seeking to avail themselves of the imperial act, 26 Geo.

III., ch. 86, need not aver that they are British subjects. *Hearle v. Ross et al.*, 259.

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## SLANDER.

See LIBEL.

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## SLEIGH.

See NEGLIGENCE.

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## SNOW STORMS.

*Right of action by lessee of toll-gate for impediments caused by snow storms.*]—See ROAD COMPANIES, 2.

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## SPIRITUOUS LIQUORS.

See MUNICIPAL CORPORATIONS, 1.

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## STATUTES (CONSTRUCTION OF.)

26 Geo. II., ch. 33 (Imperial).—See Infant.

26 Geo. III., ch. 86 (Imperial).—See Shipping, 2.

6 Geo. IV., ch. 7.—See Taxes.

1 Wm. IV., ch. 2.—See married Woman.

7 Wm. IV., ch. 18.—See Court House.

7 Wm. IV., ch. 19.—See Taxes.

1 Vic., ch. 20.—See Taxes.

8 Vic., ch. 5, secs. 2, 4.—See Shipping, 1.

9 Vic., ch. 34, sec. 7.—See Mandamus.

10 & 11 Vic., ch. 6.—See Interrogatories.

12 Vic., ch. 10, sec. 5, sub-sec. 24.—See Bills of Exchange and Promissory Notes, 3.

12 Vic., ch. 35.—See Survey, 1, 2.

12 Vic., ch. 74.—See Assignments, 3, 4, 5.—Chattel Mortgage.

12 Vic., ch. 75.—See Limited Partnership.

12 Vic., ch. 78, secs. 18, 37.—See Commission for taking Affidavits.

12 Vic., ch. 81, secs. 36, 41.—See Court House.

12 Vic., ch. 81, sec. 116.—See Municipal Corporations, 1.

12 Vic., ch. 81, sec. 2.—See Municipal Corporations, 2.

12 Vic., ch. 81, sec. 152.—See Elections, 1, 3.

12 Vic., ch. 81, sec. 192.—See Railways and Railway Companies, 1, 2.

13 & 14 Vic., ch. 48.—See Schools.

— ch. 54.—See Appeal.

— ch. 56.—See Coroner.

— ch. 58.—See Dower.

— ch. 62.—See Assignments, 3, 4, 5.—Chattel Mortgage.

13 & 14 Vic., ch. 74.—See Indians.

14 & 15 Vic., ch. 51, sec. 9, sub-sec. 5; sec. 12, sub-sec. 1.—See Railways and Railway Companies, 1, 2.

14 & 15 Vic., ch. 51, sec. 11, sub-secs. 15, 16.—See Railways and Railway Cos. 4.

14 & 15 Vic., ch. 51, secs. 13, 20.—See Railway and Railway Companies, 5.

14 & 15 Vic., (Arbitration Clauses).—See Railways and Railway Companies, 9.

16 Vic., ch. 10.—See Bills of Exchange and Promissory Notes, 3.

16 Vic., ch. 19.—See Witness.

16 Vic., ch. 180, sec. 12.—See Justices of the Peace.

16 Vic., ch. 181.—See Elections, 3.

15 Vic., ch. 182, sec. 21.—See Railways and Railway Companies, 3.

16 Vic., ch. 184, sec. 3.—See Municipal Corporations, 1.

16 Vic., ch. 190, secs. 48, 49.—See Road Companies, 2.

16 Vic., ch. 190, sec. 53.—See Pleading, 5.

18 Vic., ch. 83.—See Survey, 1.

19 Vic., ch. 43 (Common Law Procedure Act, 1856), sec. 153.—See Criminal Law, 2.

19 Vic., ch. 43 (Common Law Procedure Act, 1856), sec. 248.—See Death, 2.

19 Vic., ch. 43 (Common Law Procedure Act, 1856), sec. 242.—See Ejectment, 2.

19 Vic., ch. 43 (Common Law Procedure Act, 1856), secs. 228, 257.—See Ejectment, 3.

19 & 20 Vic., ch. 87, sec. 14.—See Flour, 1.

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## STATUTE LABOUR.

1. *By-law to compel performance of.*]—The municipality of a township by by-law enacted that any person liable to perform statute



labour, who after being duly notified should neglect or refuse to attend, should forfeit and pay 5s. for every day he should so neglect or refuse, and the payment of such fine should release such person from the performance of the duty required of him by the by-law. *Held*, that this enactment could not be considered as an attempt to compel commutation at a rate exceeding 2s. 6d. per day; and that the by-law was good. *In re Bannerman and The Municipality of the Township of Yarmouth*, 14.

2. *By-law — Overseers of highways—Statute labour.*]—A by-law directing that the overseers of highways should bring any person refusing or neglecting to perform statute labour before the reeve of the municipality, or the nearest J. P., who upon conviction should impose a fine of 5s. for each day's neglect, with costs, and adjudge that the payment of the said fine and costs, should not relieve him from performance of the labour; and in default of payment should issue a distress warrant. *Held*, good. *In re Stoddart and The Municipality of the United Townships of Wilberforce, Grattan, and Fraser*, 163.

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## STAYING PROCEEDINGS.

*See* BAIL, 1.

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## STOCK.

*See* ASSIGNMENT, 2.

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## SURVEY.

*See* DEED, 2.—HIGHWAY.

1. 12 Vic., ch. 81, sec. 31—18 Vic.,

ch. 83, sec. 8—*Levying rate.*]—The statute 12 Vic., ch. 35, sec. 31, provides for a survey of *concession lines* being made, on application to the Governor by the municipal council, which application need not be at the request of the landholders. The 18th Vic., ch. 83, sec. 8, provides for making a survey, and placing monuments to *mark the front and rear angles of lots*, on application to the Governor by the municipality, made at the request of one-half of the resident landholders to be affected. An application was made under the first act, without any request of the landholders, to mark out concession lines, and under it the survey provided for in the second act was afterwards made, *to define the boundaries of lots*: *Held*, that such survey was illegal. The rate to pay for a survey, made under these acts, must be levied not upon the assessed value of the land, but in proportion to the quantity held by the respective proprietors. *Walker and The Municipality of Burford*, 82.

2. *Side line—Township of York*—12 Vic., ch. 35, sec. 35.]—Where the lots in a concession ranging from east to west were not numbered *all the way* from the boundary line of the concession on the east, but two blocks of five lots each had been laid out in the original survey fronting on and towards that line, and the remainder of the concession in blocks of five lots each, fronting as usual on the concession line, and numbering westward *beginning at No. 10*—*Held*, that the 35th section of 12 Vic., ch. 35, would nevertheless apply, and that the side line of the lot in question (32) must be determined by the course of the eastern boundary line of the concession. *Held*, also, that the last proviso in that section would



not apply, so as to make the boundary line of the block in which lot No. 32 was the governing line, because the township was surveyed before the 27th of March, 1829. *Bell v. White.* 171.

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### TAXES.

See RAILWAYS AND RAILWAY COMPANIES, 3.

*Sale of land for taxes*—6 *Geo. IV., ch. 7*—7 *Wm. IV., ch. 19.*]—Ejectment. In 1857 the clerk of the peace issued the proper warrant to the sheriff to sell the land in question for taxes, but the sale was delayed by the 1 Vic., ch. 20, passed in consequence of the Rebellion, and was made in 1839 *under the same writ*. It was first put up on the 10th of April, when one M. offered to take twenty-nine acres for the sum to be levied, but afterwards he refused to carry out the purchase; and the sheriff in July following put up the whole lot, 200 acres, which M. then purchased for the same sum, stating at the sale that he had already acquired a title to the land, which he wished to have confirmed, and requesting the bystanders not to bid against him. This title came by deed from the treasurer, who had purchased from a person assuming to be heir of the patentee, but was not in fact his heir; and M. had given back a mortgage to the treasurer to secure part of the purchase money—*Held*, that the sale was properly made in 1839, under the same writ issued in 1837; but that the second sale of the whole lot was illegal, being unauthorised by the statutes, and improperly conducted. *Semble*, that the treasurer's connexion with the land could not avoid the sale, he

not having been in fact the purchaser. *Todd v. Werry et al.*, 614.

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### TIMBER.

*Construction of contract to furnish timber for a bridge at a certain rate per foot, lineal measure.*]—*See CONTRACT 5.*

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### TITLE.

*Undertaking to admit—Construction of.*]—*See EVIDENCE, 4.*

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### TOLL-GATES.

*Right of action by lessee of toll-gates against the road company for impediments caused by snow storms.*]—*See ROAD COMPANIES, 2.*

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### TRESPASS.

*See DAMAGES.—ESTOPPEL, 1.*

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### TROVER.

*Building on land under contract of sale—Removal of to other land purchased from vendor—Conveyance of such land to defendant—Trover by vendor—Damages.*]—The plaintiff contracted to sell a lot of land to A., who agreed to build a house upon it. A. put up the house, but the plaintiff refused to open certain streets, as he had agreed to do, and the lot was in consequence inaccessible. A. then assigned to defendant, who removed the house to another lot, which he also had agreed to purchase from the plaintiff; and after such removal the plaintiff executed

a deed to defendant of this latter lot, with all the buildings thereon. *Held*, that notwithstanding the deed the plaintiff might maintain trover for the house so removed; but the jury having given only nominal damages, the court, under the circumstances, refused to interfere. *Cleaver v. Culoden*, 582.

### UNCERTAINTY.

*In description of land in agreement for sale.*]—See VENDOR AND VENDEE, 1.

### UNDERTAKING TO ADMIT TITLE.

See EVIDENCE, 4.

### USE AND OCCUPATION.

*Liability for.*]—The land in question was sold to the plaintiff in 1855, under a power of sale contained in a mortgage, defendant being then in possession. Plaintiff repudiated his purchase, and a suit in Chancery took place, which resulted in his accepting the deed in 1855. In the mean time, and soon after the sale, defendant applied to the plaintiff for a lease, but the plaintiff said he was not in possession, and would do nothing; and defendant then leased the place to one M., to hold until the plaintiff should demand possession. No demand was made until the plaintiff received his deed, when M. went out. *Held*, that defendant was not liable to the plaintiff for use and occupation. *Osborne v. Jones*, 296.

### VENDOR AND VENDEE.

See CONTRACT, 2, 4, 5.—EVIDENCE, 2, 3.—TROVER.—USE AND OCCUPATION.

1. *Sale of land—Failure of title—Right to recover back purchase-money—Money had and received—Conduct of parties.*]—By an agreement between the plaintiff and defendant, defendant agreed to sell and plaintiff to buy certain buildings specified, “with the land which they occupy, with the whole of the dam and water privilege,” for £3,300; £250 to be paid on the 1st of January, and £250 on the 1st of March, &c.; plaintiff to have full possession by the 1st of February; a free and satisfactory deed to be given on the 1st of January, when the first £250 was to be paid. ¶The plaintiff took possession, and the two sums of £250 were paid. After he had taken possession, it appeared on a survey being made, that some of the buildings were on an original allowance for road, and that defendant in consequence could not convey that part of the property. The plaintiff being told of this by the surveyor said it must be put right between defendant and himself, and that these buildings must be left out of the deed, which the surveyor was to prepare. Afterwards he made the second payment of £250, and a deed was prepared, including the land not within the road allowance, and also the buildings on the allowance. This, however, was not executed, and the plaintiff remained until July, when he left and the defendant assumed possession, under what circumstances did not appear, and afterwards sold again to another party for £3,650. *Held*, that the evidence was sufficient to support a verdict in favour of the plaintiff for the £500 paid, either on

a common count for money had and received, as being paid on a consideration which had failed, or on a special count, as damages for the breach of agreement in not giving a deed. *Held*, also, on motion for arrest of judgment, that the declaration, set out in the statement, sufficiently shewed that the plaintiff had given up possession; and if not, that the defect was supplied by the ninth plea. *Held*, also, that upon the evidence stated below the agreement to purchase the saw-mill, in addition to the other buildings, was to be considered as an additional purchase only, not as an alteration or abandonment of the first agreement. *Quære*, per *Robinson, C. J.*, as to the effect of the uncertainty in the agreement with regard to the description of the premises. *Snyder v. Proudfoot*, 532.

2. *Agreement for sale of land—Failure by vendee to give notes on the day named—Effect of upon his right to sue on the agreement—Preparation and tender of conveyance.*—Defendant agreed to sell to the plaintiff certain land for £400, £100 by two approved notes, to be given on the 16th of May, and the remaining £300 to be secured by mortgage; and that the defendant, on receiving said notes on the 16th of May, should execute and deliver to the plaintiff a good and sufficient deed of the premises. In an action on this agreement it appeared that the plaintiff was not ready to give the notes until the 19th. *Held*, that on that ground he was precluded from recovering damages from the defendant for non-performance of the agreement on his part. *Semble*, that under the agreement the deed was to be prepared by the plaintiff, the words, "execute and deliver to the

plaintiff" not indicating a contrary intention. *Smith v. Doan*, 634.

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## VENIRE FACIAS.

*See* AMENDMENT.

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## WAGES.

*See* PARENT AND CHILD.

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## WAIVER.

*See* BAIL, 1, 2.—BILLS OF EXCHANGE AND PROMISSORY NOTES, 6.—EVIDENCE, 4.—RAILWAYS AND RAILWAY COMPANIES, 2.

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## WARRANTY.

*See* EVIDENCE, 3.—FLOUR.—PLEADING, 2.

## WILL.

1. *Estate tail—Cross remainders.*—Andrew McLaney, by his will, after leaving other land to his daughter Hannah Crozier McLaney, "her heirs, executors and assigns, for ever," devised the land in question to his son Andrew McLaney, "and to his heirs lawfully begotten," and to his grandson Jacob Crozier Ray other land, in the same manner, adding, "in the event of any of the above named devisees, Hannah Crozier McLaney, Andrew McLaney, or Jacob Crozier Ray dying before they have (or without) a lawful heir, then his, her, or their devise, or property given them by this will, shall be equally divided among the survivors or survivor; but if they shall all die without a



lawful heir, then the property given them by this will shall be equally divided among my sister Elizabeth Saunders, children." *Held*, that the devisees took and estate tail with cross-remainders; and consequently, Andrew McLaney and Jacob Crozier Ray having died without issue, and Hannah having left children, that Jacob's share went to them, not to his heir at law. *Ray v. Gould et al.*, 131.

2. *Residuary devise—Whether it includes reversion in lands before devised.*]—Testator, after leaving his homestead to his wife for life, devised to his executors "the residue of my real estate of which I shall die seised or possessed," in trust, to sell such portion as should be sufficient to pay his debts, giving them power, in order to effectuate his intention, "to dispose of said real estate in fee simple, or for a term of years, for the purposes aforesaid?" and he directed that his executors, after payment of the debts, should hold the said real estate, in trust, to convey such portion thereof as might remain to his nephews, in fee simple. It did not appear whether testator had any other land besides the homestead or

not. *Held*, that the reversion in the homestead passed to the executors, under the residuary devise. *Swart v. Gregory*, 335.

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### WITNESS.

*See* MANDAMUS.

1. *Practice—Notice to party to attend as a witness—Payment of expenses.*]—When a party to a suit is notified to attend as a witness by the opposite party, a proper sum for his expenses should be tendered with the notice, or judgment will probably not be given against him *pro confesso* if he should fail to attend. *Street v. Faulkner*, 116.

2. *Semble*, that a partner of the plaintiff, not joined in the action, is admissible as a witness. *Hitchcock v. Cronkite*, 157.

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### WORDS (CONSTRUCTION OF).

"*Remaining due.*"]—*See* COVENANT, 2.

"*Execute and deliver to the plaintiff.*"]  
*See* VENDOR AND VENDEE, 2.



















